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[Dictated]



RITES HELD FOR D. L. DELMAS

Services Take Place at Santa Monica for Noted California Lawyer.

1928

SANTA MONICA, Aug. 2.—(P)—Funeral services for Delphin M. Delmas, nationally known attorney, who died here yesterday, were held today from the family residence here. No announcement preceded the service and only relatives and a few intimate friends were present.

Rev. Wallace N. Pierson, an intimate friend of the famous barrister, read the Episcopal service. The body was removed to Los Angeles for cremation.

One special request was made by Delmas before his death, which followed a brief illness after law practice activity that extended up to a few weeks ago. That request, which will be carried out, was that his ashes be intermingled with those of his wife, who died ten years ago, and strewn over Topanga Canyon, a mountain gateway from the seashore to the valley.

Delmas was born in France in 1844 and came to California with his parents when 10 years old. He was educated in Santa Clara county, being graduated from Santa Clara college with the highest honors. He studied law at Yale, was admitted to practice in Connecticut on graduation, and later became a member of the California bar. He practiced law 16 years in San Jose. In 1867 he was elected district attorney, the only public office he ever held.

MARRIED IN 1869.

Delmas and Miss Pauline Hoge, daughter of Colonel Joseph Hoge of San Francisco, were married in 1869. Of the four children, Mrs. Elsie D. Barnes and Miss Antoinette Delmas, both of Santa Monica, are still alive. The mother died some time ago. Delmas was made regent of the University of California by Governor Stoneman in 1884, and he won distinction as a Charter day orator.

Delmas established himself in San Francisco about this time and won distinction in important civil and criminal cases. Among them was the suit of Mrs. Ellen M. Colton against Leland Stanford, Chas. Crocker and Collis P. Huntington, with the Southern Pacific railroad, then worth \$100,000,000, as the stake. Delmas, as attorney for Mrs. Colton kept the litigation alive for more than two years. He was opposed by Hall McAlister, an equally famous attorney.

FAMOUS CASES.

In the famous James G. Fair will case, Delmas represented Mrs. Nettie Craven. He defended John D. Spreckels in a suit brought by Baron von Schroeder and cut the baron's damages down to \$1. Delmas obtained an acquittal of Truxton Beale when he shot Frederick Marriott for publishing statements about Miss Marie Oge, Beale's fiancee, using the "unwritten law" defense.

Delmas' most famous case was the defense of Harry Thaw, charged with the murder of Stanford White in New York. Delmas brought forward his famous "dementia Americana" and proved a thorn in the flesh of District Attorney Jerome, considered the ablest prosecutor in the country, until he obtained a jury disagreement. The disagreement, in the public mind, was considered tantamount to an acquittal.

Delmas, by his personal resemblance to Napoleon, was often referred to as "The Napoleon of the Bar" and took the title to his death. Henry C. McPike, a former law partner, who established an office with Delmas in New York, is a resident of Oakland.

The University of California

With the compliments of

J. H. Dumas.

*This edition is limited to
35 copies of which this is
No. 3*

SPEECHES AND ADDRESSES



D.M. Adams.

Speeches and Addresses

By

D. M. Delmas



San Francisco

A. M. Robertson

1901

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THE MURDOCK PRESS

FREQUENT demands have led to the belief that a collection of the speeches of Mr. Delmas which have already separately appeared in print, sufficient in scope to contain some examples of his addresses to juries, courts, and public assemblies, would be received with favor by the public. In this belief, and with the sanction of Mr. Delmas, this volume is published.



CONTENTS

	Page
ARGUMENT IN VON SCHROEDER VS. SPRECKELS	9
ARGUMENT IN CONTEST OF PARKER'S WILL	57
ARGUMENT IN RE SHORTRIDGE	115
ARGUMENT IN THE RAILROAD TAX CASES	161
SPEECH AT SANTA CRUZ	215
ADDRESS ON EDUCATION	257
EULOGY OF STEPHEN M. WHITE	289
ADDRESS AT ELKS' MEMORIAL SERVICE	298
ADDRESS BEFORE THE SONS OF THE REVOLUTION	306
ARGUMENT IN JARMAN VS. REA: DESCRIPTION OF A POLITICAL BOSS	313
ADDRESS BEFORE THE CHIT-CHAT CLUB	317
ADDRESS ON INDEPENDENCE DAY	323
WALTER SCOTT: ADDRESS BEFORE THE ST. ANDREW'S SOCIETY	329
ADDRESS ON THE INAUGURATION OF THE HON. HORACE DAVIS AS PRESIDENT OF THE UNIVERSITY OF CALIFORNIA . .	339
ARGUMENT IN THE CASE OF COLTON VS. STANFORD, ET ALS.	344
ADDRESS BEFORE THE LEGISLATURE OF CALIFORNIA . . .	353

TO A JURY

THE following argument was made by Mr. Delmas, in the Court House, in San Rafael, on the 22d of December, 1900. The nature of the controversy which called it forth is correctly stated in an editorial of the *Argonaut*, published at the close of the trial:—

“The case was, in many respects, a peculiar one. Baron von Schroeder, the plaintiff, is a German subject, an officer in the German army reserve, and for many years the husband of a California millionaire’s daughter. He has been domiciled in California for some twenty years. Among the other property belonging to his wife is the Hotel Rafael, in Marin County, a popular summer resort. The defendant was John D. Spreckels, son of Claus Spreckels, the multi-millionaire, and himself a millionaire. In addition to his many other properties, John D. Spreckels owns the *Call* newspaper. In October, 1898, the *Call* printed an account of certain alleged doings at the Hotel Rafael, making accusations concerning Baron von Schroeder’s conduct toward the ladies there, both married and single, winding up with the statement that the lessee of the hotel was forced to throw up his lease by reason of the scandalous conduct of the lessor, Baron von Schroeder. As a result of this article, Von Schroeder brought suit against John D. Spreckels for two hundred and fifty thousand dollars damages for libel. The suit has just ended with a verdict in favor of Spreckels and against Von Schroeder.

“The suit was remarkable in many respects. The prominence of the two parties, their wealth, and the fact that the testimony in the case would involve the names of some of the lady guests, attracted wide attention.”



VON SCHROEDER vs. SPRECKELS

IF IT PLEASE YOUR HONOR, AND YOU, GENTLEMEN OF THE JURY: In his opening the learned counsel has dwelt upon the importance of this case to his client. He has told you of its momentous consequences to him. All this is beyond question true. But there is also another consideration which renders your verdict one of paramount importance. By that verdict you will define the proper limits of the rights and duties of the press in this State. You will authoritatively answer what I asked you when examining you as to your competency as jurors. You will decide the question whether, whenever it acquires knowledge of individual conduct of such an open and flagrant character as to become a menace to morals, it is the right and duty of a newspaper to protect the homes of the community by holding up that conduct to public censure. This consideration it is, gentlemen, which will give port and stature to your deliberations, and impart its true dignity to your verdict. Whilst, therefore, I do not doubt the great interest which the plaintiff has in your judgment, I feel confident

ARGUMENT

that you will not fail to appreciate the fact that the public have in the outcome an equally deep concern.

The rights and duties of the press are, at times, much misunderstood. No one contends, of course, that it has a right to invade homes for the purpose of prying into strictly private conduct, however depraved. But whenever that conduct takes place under such circumstances that the public must, of necessity, be affected by it, then a public journal has not only the right, but is charged with the duty of exposing it. If, therefore, the character of the life led by the plaintiff has been not only in itself immoral, but has been displayed in such a manner that the public could not but be scandalized by it, I shall appeal to you to establish by your verdict that the newspaper which has held him up in his true light is not only not open to the charge of overstepping the bounds of its legitimate province, but, on the contrary, deserves commendation for what it has done.

It remains for you, therefore, in the discharge not only of the duty which you owe to the plaintiff, but of that which you owe to the community, carefully to determine the facts of this case, and then to decide whether those facts legally afford to the defendant as the owner of this paper immunity for this publication.

The proper attitude of the press with reference to matters of this kind is outlined in the editorial

VON SCHROEDER vs. SPRECKELS

published the day after the appearance of the article in question. That editorial, put in evidence by the plaintiff himself, has been read to you. It presents, couched in very clear language, the canons of ethics universally adopted for the guidance of the press in the United States.*

* The editorial is in these words:—

“THE EXPOSURE OF SCANDALS.

“A journal devoted to the welfare of society as well as to the dissemination of news carefully abstains from the publication of scandals in the lives of private individuals as long as it is possible to do so without wrong to the community. When, however, the scandals become notorious, and are committed by persons who by reason of their wealth and the influence of their families have admission to the homes of the city, it then becomes necessary for the protection of womanhood to expose the evil, in order that the offender may be known and society put on guard against him.

“The contaminating effect of notorious wrong-doers who rely on wealth and social position to enable them to practice a vicious course with impunity is far-reaching. Persons thoroughly innocent of wrong intent are not infrequently made the objects of unjust suspicion simply because in their ignorance they associate with some unexposed rascal in society. When to save innocent persons from that danger it becomes necessary to make public the scandalous life of the offender, then the exposure becomes a duty which the press owes to the public.

“There are many persons of depraved tastes and appetites with a fondness for violating the established code of social ethics who can be restrained only by the fear that if they persist in evil courses they will be exposed and held up to the public scorn. The existence of an independent press, ready to make the exposure without fear or favor, acts therefore as a safeguard to the community. Even where it does not deter some bolder profligate from pursuing a career of notorious scandal, it at least gives notice of his character and puts

ARGUMENT

Was the article in question published in furtherance of the lofty and praiseworthy purposes so well expressed in that editorial? Or, contrariwise, was it, as claimed by the learned counsel, conceived in prejudice and born in malice? If the former, then, I repeat it, the article is not only blameless in law, but is in fact commendable. If the latter, it is beyond question deserving of the severest censure.

Here, then, we are confronted with the first great question in this case: What were the motives which prompted the publication of this article? The learned counsel has been pleased to describe them in the following words:—

“We say the article was wanton, willful, malicious, false, and for the purpose, and the sole purpose, of using a powerful metropolitan paper owned by an unscrupulous millionaire to blast the reputation and fame of a man against whom he entertained some feeling of personal enmity or hatred.”

Is this true? If it is,—if this publication originated in a malicious purpose wantonly to injure the plaintiff, to destroy his character and to ruin his happiness,—then the defendant has indeed placed himself beyond the pale of the law. Under such

the homes of the city on guard against him. The publication of private offenses is therefore one of the disagreeable acts which must at times be performed by even the most careful journal that has any respect for virtue and any true comprehension of its duty to the public.”

VON SCHROEDER vs. SPRECKELS

circumstances justice would not only permit but would demand that the jury visit with condign punishment the publisher who could pervert to such base uses the vast powers confided to his hands; and you, gentlemen, would have the full warrant of the law to express by your verdict the abhorrence with which such a character should be looked upon —a character, as well stated by the learned counsel, with which the cutpurse, the burglar, or even the shedder of human blood, is, in point of depravity, not to be compared. I ask you, then, had the learned counsel any ground for this denunciation of my client? Do his words find justification in the evidence?

The evidence shows on the contrary, that the defendant never entertained the slightest animosity against the plaintiff. It shows that the article did not originate in a desire to gratify a personal grudge. It shows that the publication was not made with a view to inflict injury. This is established by considerations to which I shall presently invite your attention.

Before entering at large upon this field of discussion, however, let me dismiss with a smile the suggestion, but half-voiced by the learned counsel, as if his own good sense instinctively shrank from giving utterance to such a proposition, that Mr. Spreckels sought to destroy the reputation of the resort owned here in San Rafael by the plaintiff, because, forsooth, he himself has some interest in a

ARGUMENT

similar establishment in the southern part of the State—some six hundred and twenty miles away!

And now as to the question of malice. In dealing with this branch of the case, gentlemen, I might well rely upon the name which the defendant bears as affording in itself a sufficient refutation of such a charge. That name has been for nearly half a century inseparably associated with the growth and development of the resources of California. It is indissolubly linked with our most important manufacturing, commercial, and industrial enterprises. Its very utterance at once suggests to the mind of every man who hears it honorable dealing and enlightened generosity. Prosperity has rewarded the labors of the family of the Spreckels; public benefits have flowed from the vast scope of its varied undertakings; and public gratitude has attested its open-handed munificence. No man—no group of men—could have successfully conducted enterprises so protracted, diversified, and extensive, if the guiding-star of their course had been personal spite or petty malice. Such achievements must have for their basis kindliness and good-will to all men.

The fair and broad-minded business methods which have ever characterized Mr. Spreckels's undertakings did not desert him, when, now some three years ago, he became the owner of the *Call*. The work was novel. His walks had been in other fields. Of the management of a great public journal he had little knowledge. But his innate sense

VON SCHROEDER vs. SPRECKELS

of right and justice afforded—so far, at least, as tone and policy were concerned—a sufficient guide. He promulgated one cardinal rule, from which he has never permitted the paper to depart. He traced a line of conduct, from which he has never allowed it to swerve. He laid down one maxim, which he has always compelled it unquestioningly to obey. From the very start, his orders were that nothing should be published without having first undergone the most scrupulous examination as to accuracy and truth; and that if in the unavoidable expedition of the work some inaccuracy should elude the rigorous vigilance imposed, then, as soon as the facts were ascertained, a retraction or modification should at once be printed, in a place as prominent and in type as conspicuous as the original matter.

This was the spirit with which Mr. Spreckels entered upon his new and important duties as the owner and editor of the *Call*. And in this spirit he has conducted it until now. These facts, gentlemen, are established by uncontradicted testimony. Indeed, no one disputes them.

When he speaks of the motives of Mr. Spreckels, and affirms that he desired to "gratify his unscrupulous malice by the publication of this article," and to "blast the reputation and fame of a man against whom he entertained some feeling of personal enmity," does the learned counsel overlook the fact that, from the time this article was first spoken, or even thought, of until it saw the light, Mr. Spreckels

ARGUMENT

was at his sugar factory in Salinas? Does he forget that the first intimation he had of this article, or of any matter connected with it, was when, on his return home, he read it in the *Call*? Is it pretended that before that time he knew of the information that came, on the evening of the 24th, from San Rafael? No one so pretends. Is it pretended that he knew of the interview with General Warfield, which took place that evening? No one so pretends. Is it pretended that he sanctioned, or even had any intimation of, the publication until after it was made? No one so pretends. When all these things took place he was quietly asleep one hundred and twenty miles away. What, then, becomes of this charge of malice?

Independent of this, which may be called negative proof, the circumstances affirmatively show not only the utter lack of malice, but even a feeling of consideration—of ill-advised and undeserved consideration, as the event proved—for the plaintiff. To these circumstances I now invite your attention.

Fifteen days before the article in question was published, on the night of the 10th of October, 1899, news reached the *Call* office of a certain episode that had just taken place at the Palace Hotel in which the plaintiff and his brother were implicated. What the nature of that episode was may be inferred from the fact that the learned counsel who is here championing the reputation of his

VON SCHROEDER vs. SPRECKELS

client durst not permit us, though we had the witnesses at hand,—one of them actually on the stand,—to inquire into or prove it. Though the facts were indisputable, the general manager would not take upon himself the responsibility of giving them to the world. In dealing with a matter which affected the character and social standing of two such prominent men he deemed it his duty to invoke the decision of his chief, the owner of the paper. Accordingly, though it was then past midnight, he telephoned to Mr. Spreckels, calling him to the editorial rooms. Upon his arrival, a little before one o'clock, Mr. Spreckels is made acquainted with the condition of affairs. The article, then already prepared, is shown him. He is told that the facts stated in it are beyond question true. He is informed that the manager and heads of departments are unanimous in the opinion that the canons of newspaper ethics warrant the publication. What does he do? If he entertained feelings of enmity against the plaintiff, here was an occasion to glut full his hatred. All he needed to do was to sanction the publication. Did he do so? On the contrary, he forbade it. Was that done in malice? Was it done to gratify revenge? Was it, to use the language of the learned counsel, done "for the purpose of using a powerful metropolitan paper to blast the reputation and fame" of an enemy?

There is another circumstance which may be adduced in confirmation of the fairness of Mr.



ARGUMENT

Spreckels, and the utter absence of malice on his part. As already stated, he knew nothing of the article until after it was published. He reads it, on the afternoon of the 25th of October, while on his way home from Salinas. He arrives in San Francisco at about four o'clock. He employs the remaining moments of daylight in dispatching the business accumulated in his office. In the evening, he sees for the first time the publication in the *Bulletin* purporting to be a letter signed by General Warfield. He is at once struck with the apparent contradiction which it gives to the statements contained in the article. He asks himself: "Is it possible that during my absence my instructions have been disregarded? Has my staff neglected the observance of those rules of circumspection and prudence which I have from the start inculcated? Has a mistake been made? Has a wrong been done to Baron von Schroeder?" He resolves to obtain immediate information in answer to all these questions. It is then too late, the night being already somewhat spent. But the very next morning he sends for General Warfield, requesting him to come to the *Call* office. The General arrives there shortly after midday.

What took place at that interview you know. It is stated by Mr. Spreckels, whose evidence is in no manner questioned. He testifies that he said, in substance: "General, do I understand that, by your letter published in the *Bulletin*, you intend to deny

VON SCHROEDER vs. SPRECKELS

the accuracy or truthfulness of the statements contained in the *Call* of yesterday?" The General, in substance, replied: "No, Mr. Spreckels; I do not. I have not said, and do not intend to say, that the statements contained in the article are not true. On the contrary, I assert that I firmly believe them to be true. Note that I do not say in this letter that these statements are untrue, nor that I do not believe them to be true, but, simply, that I have no personal knowledge of the facts upon which they are based."

Interpreted in the light of what we now know, what was the meaning of this statement of General Warfield? Simply this: "I personally did not sit up from evening until dawn to see Baron von Schroeder gambling with women in the club-house; I personally did not remain in the wine-room from eight at night until four in the morning, with him and his male and female companions, to see them carousing and getting drunk; I personally did not see him leave the hotel on the night when, with a bridegroom and bride and another woman, he drove to a disreputable resort, and there remained alone with the bride until three or half-past three in the morning. None of these things did I see with my own eyes. But they came to me from sources which I could not question. I believed them to be true when I stated them in the interview with the manager of the *Call*. I believe them now. I have not denied and do not intend to deny them."

ARGUMENT

The learned counsel has sought to persuade you that in the failure of the *Call* to retract the article in question you must find an evidence of Mr. Spreckels's malice against the plaintiff. But after this interview with General Warfield, what retraction was possible? What could the *Call* say? That the information upon which its article was based was incorrect? But General Warfield had just confirmed it. That the facts related in the article were not true? But General Warfield had just reaffirmed them.

I can well imagine circumstances under which a retraction would have been proper, and a refusal to make it would have afforded evidence of malice. Suppose at the interview in question General Warfield had said: "Mr. Spreckels, the article in the *Call* is an unjust imputation against an innocent man. The charges it contains are not true. During the many years I have conducted the Hotel Rafael Baron von Schroeder's behavior has been that of a gentleman. His conduct toward the ladies of the house has always been characterized by courtesy and respect. I have never heard of his doing anything that could offend modesty or expose him to censure." If this had been said, then indeed the refusal to retract would have been indefensible.

But do you believe, gentlemen, that if that had been the language of General Warfield, Mr. Spreckels would not at once have ordered a retraction

VON SCHROEDER vs. SPRECKELS

published? Do you believe it, knowing the rules of fairness and justice which he had prescribed from the start for the conduct of his paper? Do you believe it, knowing how he exercised his authority on the night of the 10th of October, when he suppressed the publication of the Palace Hotel episode? Do you believe it, knowing that his first thought after reading the *Bulletin* was to send for General Warfield, to ascertain from his own lips whether a wrong had been done, and whether there was just cause for redress? You do not believe it. You know that the promptings of his own heart, the uniform policy of his paper, the considerateness which he had already shown would all have irresistibly impelled him to cause such a retraction to be published. But General Warfield made no such statement. To retract in the face of what he had said would have been to falsify the truth.

Permit me to submit, in addition to all this, that the plaintiff's conduct since the publication has been such as to confirm Mr. Spreckels's conviction that the facts of the article were true and its strictures deserved. The publication was made on the 25th of October, 1899, about sixteen months ago. As the plaintiff claims that it was both unjust and untrue, it behooves us to ask whether his subsequent course was that of an innocent and injured man. What would such a one have done? Would he not have sought the person who had wronged him, and, strong in the consciousness of his inno-

ARGUMENT

cence, have said: "You have done me an injustice. You have brought undeserved suffering upon me and mine. The things you have published are not true. The strictures you have made are unwarranted. Of all this I can give you proof. If I do, may I not appeal to you to right the wrong you have done?" Or, if he shrank from going personally, would he not have sent some representative in his stead? Would he not have said to some friend or attorney: "Go to the publisher of this paper. Satisfy him that this article is not true. Impress upon him the pain and suffering which it is calculated to inflict. Appeal to his sense of justice to set me right before the world?" Would not this, I take leave to ask you, have been the course pursued by an innocent and wronged man? But nothing of the kind was done by the plaintiff. Neither in person nor by representative did he communicate with Mr. Spreckels, nor question the truth or the justice of the article, nor seek to prove the groundlessness of its accusations, nor ask for reparation. His conduct throughout was that of a man conscious of guilt. Instead of thus seeking that redress which, had it been deserved, he well knew Mr. Spreckels's sense of fairness would gladly have accorded, he preferred to demand it in a court, where, by means of technical devices, he might hope to shut out the truth. He sought not for reparation, but for money.

May I not at this point, therefore, confidently hope to have established to your satisfaction that the

VON SCHROEDER vs. SPRECKELS

charge that, in the publication of this article, Mr. Spreckels was actuated by malice is unfounded?

I think I am warranted in the statement that the learned counsel is by this time convinced that it is unfounded; for, in despair of making good his accusation of actual malice, he has sought to establish malice by imputation. It is not doubtful that, though one may not be actuated by feelings of personal animosity, yet his conduct may be so reckless, his disregard of the rights of others so wanton, as to warrant the inference of a condition of mind equivalent to actual malice. Having endeavored to refute —having, I hope, refuted—the charge of actual malice, I am now, therefore, brought to consider the question of imputed malice. I shall here endeavor to show circumstances which prove that the conduct of the *Call* was neither wanton nor reckless. In order to do this, I am forced to enter into a brief examination of the origin of the article in question.

How, then, did that article originate? In the year 1899, Mr. Francis L. Perkins acted here as the correspondent and representative of the *Call*. Early in October of that year, he made a report to the general manager, relating to the conduct of Baron von Schroeder at the Hotel Rafael, and the consequences which that conduct was calculated to bring about. That report was as follows:—

“ That Mrs. Warfield had informed him that the General would be obliged to give up the lease of the Hotel Rafael, on account of Baron von Schroeder’s

ARGUMENT

profligate conduct; that for months the conduct of the Baron toward the lady guests of the hotel had been such that it had grown notorious; that he had insulted women; that there were other women who were on such intimate terms with him that he could not insult them, but that his conduct with them had been an insult to decent women at the hotel; that his conduct had not been confined to the hotel, but had been carried on at roadside resorts with the guests of the hotel, and, in particular, at a place called Pastori's, or Fairfax Villa; that he had taken guests of the hotel there, and his conduct had been such that it had become noised about the town, and that these stories were reflecting seriously upon the hotel; that his carousals around the hotel with members of both sexes had been such that General Warfield had been compelled to make repeated protests to him, and that, if that conduct did not cease, the Warfields would be obliged to give up their lease; that she did not believe that that conduct would cease, because she did not believe the leopard could change its spots."

This report, you will recall, was based upon an interview which Mr. Perkins had had, in the rear office of the hotel, with General Warfield and his wife. It was an echo of what had been said to him by Mrs. Warfield, confirmed by the tacit assent of her husband. That Mrs. Warfield made the statement as reported has not been questioned. Mr. Perkins testifies to it; and the failure of the plaintiff to call either General Warfield or his wife to con-

VON SCHROEDER vs. SPRECKELS

tradict him is an admission of the truthfulness of his testimony. Indeed, throughout the conduct of this case, that evidence has been accepted as true. Mr. Perkins is one of the few who have escaped the general charge of perjury so broadly fulminated by the learned counsel against our witnesses.

In investigating the origin of this article, we start out, then, with the undisputed fact that, early in October, 1899, in the presence of her assenting husband, Mrs. Warfield, speaking to one whom she knew to be the correspondent of a great metropolitan journal, made these statements touching the character of the conduct of the plaintiff; and the further fact that the correspondent immediately reported his information to headquarters.

The next step brings us to the course pursued after the reception of this information. What did the management of the *Call* do? Did it seize with avidity upon this piece of interesting information, coming from a source so manifestly reliable? No. It proceeded with caution. It deferred action. Mr. Leake said to Mr. Perkins: "Wait until we have a confirmation of these statements. Wait until we learn that there is substance enough in them to end in the threatened culmination. If it shall turn out that the Warfields are indeed compelled by the Baron's conduct to give up the lease of the hotel, your story will have materialized. It will have assumed a tangible shape. The giving up of the lease will become a matter of official record and

ARGUMENT

public notoriety. Then will we be authorized to acquaint the public with all the facts." Mr. Leake accordingly withheld for the time being all publication. This, too, is undisputed.

What happened next? On the 24th of that month, Mr. Perkins—who, in pursuance of his instructions, had kept in touch with the matter—telephoned to Mr. Leake that the lease of the hotel had been surrendered by the Warfields, and that the formal documents were to be executed on the following day. What did Mr. Leake do? Did he unquestioningly accept the statement of his correspondent? No. In consonance with the spirit of the instructions which Mr. Spreckels had from the start laid down,—that is, to publish nothing until after every available source of information had been exhausted,—he at once telephoned to General Warfield to be informed whether it were true that he had given up the lease of the hotel. The General regretted that the news had got out, but stated that, since it had, if Mr. Leake would come to him in person, he would give him the facts and necessary explanations. Though the duties of Mr. Leake's position as general manager obviously did not permit him to act as an interviewer or gatherer of news, nevertheless, leaving the more important labors of his office, he proceeded in person to the California Hotel to see General Warfield.

What took place at that interview? Upon that subject the record is so complete, the bulwark of

VON SCHROEDER vs. SPRECKELS

proof so impregnable, that the learned counsel has not even attempted to assail it. As authentic sources of information, we have, first, the testimony of Mr. Leake; secondly, that of Mr. Raymond, the reporter who accompanied him; and, thirdly, the notes which the latter, writing down the words as they fell from the General's lips, made at the time. What, then, was the statement thus made, on the evening of the 25th of October, 1899? It is this:—

“ That the Baron's conduct had brought scandal on the hotel, and had driven many respectable people away; that he had acted like a low, vile character; that there was a certain prominent society woman of San Rafael whose relations to the Baron were liable to become a public scandal at any time; that she was in the habit of inviting young women to parties or dinners given to the Baron, and abetting him in debauching them; that poker games were conducted by the Baron; that he thought he could insult any woman with impunity; that his presence at the golf links had driven respectable people away; that a young woman who had come to the hotel a respectable girl, but susceptible to flattery, of which he was a past master, had been ruined by him; that he had debauched her right there in the hotel; that another one had been degraded by the machinations of the Baron and his brother; that they had ruined the good name of the hotel, for the Baron took no pains to cover up these acts, but rather took pride in flaunting them; that guests had complained repeatedly of his conduct; that he followed women through the

ARGUMENT

grounds of the hotel and ogled them from the veranda; that an elderly lady and her two daughters complained that he would follow them about the grounds, bobbing up here and there and in every way making himself so obnoxious that they finally left."

With this statement Mr. Leake returned to the general office. Let me briefly foot up the sum of his information at that point of time. First, he had knowledge of the episode in which Baron von Schroeder had been involved in the Palace Hotel—the episode whose publication Mr. Spreckels had vetoed on the 10th of that month; secondly, he had the statement of Mrs. Warfield, made at the Hotel Rafael, as communicated to him, in the same month, by Mr. Perkins; thirdly, he had the statement which General Warfield, under circumstances affording ample warranty of accuracy and truth, had just made; fourthly, he had, as an ultimate confirmation of the whole matter, the character and position of his informant, a general in our militia, a man of ripe years and extensive experience.

With all this before him, how could Mr. Leake doubt the accuracy of his information? Knowing these facts to exist, what was he to do? It was his duty to gather and to publish news of general and public interest. He ordered this published. Who will say, that, in so doing, he acted without due circumspection? Who will say that he had not exercised every precaution that the most rigorous prudence could exact? Place yourselves in his shoes.

VON SCHROEDER vs. SPRECKELS

Imagine yourselves charged with the duties which then rested upon him. If so circumstanced, would you have believed that information coming to you from such a variety of reliable sources was unworthy of belief? Would you, on that ground, have withheld it from publication?

I now take leave of the question of malice. In view of the circumstances which surround that subject, am I not warranted in demanding from you, at this point, your assent to the proposition that neither is Mr. Spreckels chargeable with malice in fact, nor is Mr. Leake taxable with malice by inference? Recalling, as concerns Mr. Spreckels, the general instructions which he had given from the start for the conduct of his paper; the rigorous and unvarying enforcement of those instructions; his forbearance, when he suppressed the publication of the Palace Hotel episode; his absence from the city during the whole of the time elapsing from the inception to the publication of the article in question; his prompt sending for General Warfield, when he read the letter in the *Bulletin*, to learn whether an injustice had been done; the assurance he then received from the General that the facts stated in the article were true,—recalling all this, I ask you to acquit Mr. Spreckels of this odious charge of malice in fact. As regards Mr. Leake, remembering the information which he received from Mr. Perkins early in October; the incidents of the Palace Hotel episode, which he learned on

ARGUMENT

the 10th of that month ; his suspending the publication of the facts communicated to him by Mr. Perkins until they should be substantiated by some event of a public nature ; the corroborative information which he received from Mr. Perkins on the 24th of October ; his interview with General Warfield on the evening of that day ; the positive statements then made by the General in the presence of the reporter, Mr. Raymond ; the character and standing of General Warfield,—remembering all this, I call upon you to declare that Mr. Leake acted throughout with commendable prudence. I call upon you to acquit him of remissness or negligence, and, therefore, of malice by inference.

If I have dwelt at some length upon this question of malice, it is not only because justice requires that my client should be fully cleared of the grave imputation cast upon him by the learned counsel, but because of the importance of the subject, viewed from a purely legal standpoint. In cases of this character, the damages which it is in the power of the jury to award are of two kinds. The law calls the first compensatory, and the second punitive. It may not be improper to make some explanation of these terms, in order to prepare your minds for the reception of the ideas which his Honor will convey to you through his charge.

Any one may recover compensation for the injury occasioned him by the legally unwarranted act of another. And if the act was prompted by malice,

VON SCHROEDER vs. SPRECKELS

actual or presumed, he may, in addition, be awarded such sum as a jury shall in its judgment deem an adequate punishment of the wrong-doer. Take the following illustrations: If, while burning off the stubble of his field, a farmer, through want of proper precaution, permits the fire to spread to his neighbor's house and consume it; if, by negligent handling, a hunter causes his fowling-piece to be discharged against his companion's dog and kill it; if a cabman carelessly upsets his hack and breaks the arm of his passenger,—they may each be called upon to make good the damage they have caused. But if their conduct is malicious,—if the farmer purposely sets fire to the dwelling, if the hunter wantonly shoots the animal, if the cabman with insults and blows drags his patron from his vehicle,—then the jury may be called upon to award, in addition to mere compensation, such an amount as it may deem adequate punishment for the turpitude which accompanies the injury. The same rule applies to the case at bar. Reputation is a valuable possession, held by a title as valid as that which secures the enjoyment of lands and chattels or the safety of life and limb. Inasmuch as it injures reputation, a libel is actionable. The person injured has a right to be made whole for the damage which it inflicts—the loss in reputation he has suffered. But, beyond this, if the libel is not only false, but the publisher, knowing it to be so, gives it out for the purpose of gratifying his malice,

ARGUMENT

then the law calls upon the jury to award not only compensation to the victim, but punishment against the wrong-doer.

With this explanation, gentlemen, you will perceive that, from a legal standpoint, all I have so far said goes merely to prove that, whatever else you may do in this case, there is no room for awarding damages against Mr. Spreckels by way of punishment.

This leaves for consideration the question whether there is any ground for rendering against him a verdict by way of compensation. In other words, if the facts afford no warrant for punishing Mr. Spreckels, do they afford any for awarding compensation to Baron von Schroeder? This depends upon two considerations: First, is there any room for awarding a verdict against Mr. Spreckels at all? and, if so, secondly, what considerations should have scope in determining the amount of that verdict? Briefly, has the plaintiff been, in law, injured by this article? and, if so, to what extent?

In an action for libel, gentlemen, no recovery whatever is allowable when the words uttered are true. If, therefore, the statements contained in the article in question were substantially correct,—if the conduct of the plaintiff at the Hotel Rafael revealed him to the eyes of the community as a man of the character delineated in that article,—that ends your inquiry. In this State no one can be held liable for uttering or publishing the truth, however injurious



VON SCHROEDER vs. SPRECKLES

to another the results may be. The policy of our law requires that private and public affairs shall be carried on upon a basis of truth; and whoever, by word of mouth, or through print, furthers that policy commits no wrong, however grievous may be the hurt which his utterances may cause to the feelings or the business of another. To all who complain of the utterance of the truth, the law answers: "You have no right so to conduct yourselves, or so to transact your affairs, as that truth will injure either."

Such being the law,—and that it is you will learn from his Honor's charge,—the only remaining question is this: Is the article in question in substance true? I pray your attention, while I briefly rehearse the testimony which tends to prove—which, I humbly submit, does prove—the substantial truth of the charges contained in the article. Be pleased to bear in mind that the question here is: Was the conduct of Baron von Schroeder, as manifested and known at the Hotel Rafael, of such a character that it may properly be characterized as that of an immoral and profligate man?

Examine, first, his conduct in connection with drinking-bouts and nightly carousals with female companions at the hotel.

Bernard Peters, a waiter there from May to September, 1898, testifies that the plaintiff was in the habit of drinking in the club-house with women, staying at times as late as four o'clock in the morn-

ARGUMENT

ing, the women, to use his own words, "drinking often more than they could stand." William S. Ballard, the manager in the summer of 1898, states that the plaintiff frequented the club-house with women at late hours of the night, the party usually disposing of four bottles of "Dry Mumm," their favorite wine. Carl Schaubye, a waiter there, while making substantially the same statement, adds that he had seen one of the women in a state of intoxication. Thomas Flaherty, employed about the stables, states that in these nightly carousals the women were often intoxicated. He describes how, on one occasion, when the drinking had commenced early in the evening, a young girl, at an hour past midnight, fell fainting from her chair; how a physician had to be sent for; and how she was secretly taken into the hotel through the side-door.

I pass next to the gambling at the club-house. Upon this subject the testimony is equally explicit.

One of the plaintiff's own witnesses, speaking of the gambling parties, at which poker was the game, says,—I quote his own language,—“they usually commenced at eight o'clock in the evening.” Carl Schaubye, already mentioned, states that they lasted, as a rule, until three or four in the morning. He relates that on one occasion, when the group consisted of one single woman and half a dozen men, he came into the room and stated that Mrs. Warfield, the wife of the manager, had ordered that the

VON SCHROEDER vs. SPRECKELS

lights be put out. The woman—who, the witness says, was intoxicated—became indignant, and would not have it so. Schaubye afterward returned. Of that return he says: “I came again later, and told them that Mrs. Warfield insisted upon the lights being put out; and the Baron said that he wished to play three or four more games, and then they would go.”

Take next the plaintiff’s demeanor toward women.

Upon that subject, Mr. Francis L. Perkins testifies that on one occasion which he specifies he saw the plaintiff and his brother, in company with two ladies, at Pastori’s Fairfax Villa. It appeared to the witness—to express it in his own language—that “the Baron was pretty fresh with women; entirely too loving with a lady for a married man; his attentions to her a little too marked for the attentions of a married man to a married woman in public.” He added to this, in his statement to Mr. Leake, that the Baron’s reputation in the town of San Rafael in regard to women was bad—very bad indeed. Bernard Peters, the waiter at the club-house, says that once, when he brought wine into one of the rooms, he found a certain woman seated on the Baron’s lap; and that on another occasion, in the same place, the Baron had his arm around her waist and was calling her “My dear.” He adds that he had been asked by the Baron to give him warning if, while he was at the club-house, his wife came in

ARGUMENT

sight. Edward R. Ross testifies that the Baron was in the habit of paying marked attentions to a certain married woman; that he had frequently seen him seated on the porch of the club-house, while the lights were turned out, holding her upon his lap. William S. Ballard states that at one time, when the Baron and his brother were in the club-house with two women—one married and the other unmarried—drinking, he brought in a bottle of wine; that the unmarried woman took the bottle, saying, "This is for my boy, Alex, and me"; that he was then ordered to bring in another bottle; and that, when he came in with it, he found the women seated on the men's laps—the married one on the Baron's, and the unmarried on his brother's. He adds that once, at an hour past midnight, the Baron gave him five dollars, telling him to keep watch for his wife, and if she made her appearance at once to notify him. Gus Lally testifies that he had seen the Baron scuffling and scrambling around the room with his female companions; that the party generally consisted of four, the Baron, his brother, and two women; that they usually commenced drinking together in one room, but frequently, after staying there for a time, separated into pairs—the Baron and one of the women remaining in the room, and his brother and the other retiring to a separate apartment. Thomas Flaherty tells you that one evening he saw the Baron in the Maze, seated on a bench with a woman, one arm around her waist, the

VON SCHROEDER vs. SPRECKELS

other upon her breast, and his cheek pressed close to hers. Raymond O'Neil, one of the bell-boys, states that he had frequently seen the Baron coming, in the afternoon, out of the room of a particular woman, whose husband's business called him to San Francisco in the daytime. John Bailey, a waiter in the dining-room, testifies to a scene which he witnessed one afternoon in a grove upon a slope back of the hotel. You have heard that testimony, and I will not again assail your ears with a repetition of its details.

There is one episode, gentlemen, connected with this branch of the case, to which I desire to invite your special attention. The circumstances of that episode, though incomplete, have been sufficiently brought to light. And if, when I shall have rehearsed the facts which are in evidence, it shall appear that, owing to technical objections interposed by the learned counsel, certain links in the chain are missing, I feel confident that your good sense and knowledge of life will readily supply them.

Baron von Schroeder was in the habit of sending at night to a livery-stable in the neighborhood of the hotel for teams. These were used to go out upon what one of the witnesses has called "the Baron's escapades." One evening in the summer of 1898, a message reached the stable ordering a six-seater for what was known at the hotel as "the Baron's party." Pursuant to orders, the rig was taken from the stable at about half-past ten, not to

ARGUMENT

any of the entrances of the hotel, but to a secluded spot outside the grounds. The party, consisting of a bridegroom, with his bride, and the Baron and a female companion, shortly thereafter came to the spot. The driver, Jewell, who had brought up the rig, was ordered to await their return. It had originally been intended, it would seem, that the Baron's brother should be of the party; for, as they started off, the bride said to the driver, " You tell Baron Alex, when he comes up, to follow us to Fairfax Villa," and the plaintiff added, " Tell him that he will find us at Pastori's." The character of this resort as a roadside tavern, some three miles distant from the hotel, you have learnt from the evidence. The party must have reached it about eleven o'clock. How they spent the time there we were prevented by objection of the learned counsel from proving.

The next scene takes place about one o'clock past midnight, when the team returns with the bridegroom and the other woman—the Baron and the bride being left behind. We were not allowed to prove the bridegroom's condition. Conjecture it from the fact that he came back without his bride, and had to be taken out of the rig and hurried into the hotel by a side-door. The younger Baron and the bride's sister met the rig upon its return. Imagine the latter's amazement and alarm, when she found that her sister and the plaintiff were missing. In her consternation, she gets her T-cart

VON SCHROEDER vs. SPRECKELS

from the stable and starts out in the darkness of the night to seek the absent couple. She finds them where? We were not permitted to tell. What doing? We were not allowed to prove. But is evidence needed, gentlemen, to picture what had detained the pair at Pastori's?

The last scene takes place at about half-past three in the morning, when two vehicles, some distance apart, approach the hotel. One of them is the young girl's T-cart, and the other the Baron's rig. The former contains the bride and her sister, and the latter the Baron and his brother. Jewell meets them near the spot where he had been ordered to remain. He has described in detail how they came, how they entered the hotel by different doors, and in what state of helpless intoxication the bride was when taken out of the cart.

To all this testimony, gentlemen,—to the statements of all these witnesses,—what does the learned counsel reply? He pursues a course which, I am forced to confess, appears to me most extraordinary. He first points out that these witnesses all come from the humbler walks of life. They are, he says, bell-boys, waiters, stablemen, and bar-tenders. I do not deny that they are humble. I know that they are poor. I admit, if it please the learned counsel, that, unlike his client, they make no pretense to wealth; that, unlike him, they dwell in no palatial mansion; that, unlike him, they have married no millionaire's daughter, nor received at her hands, nor

ARGUMENT

squandered in revelry, her ample fortune. Acknowledging the contrast, I even go further. I admit that they do not spend their nights in drink, quaffing wines of renowned vintages. I admit that they do not sit up with elegant and fashionable ladies gambling from early eve till early morn. I admit that their manners are not attractive enough and their arts not sufficiently fascinating to lure young brides from the side of their husbands and take them to disreputable haunts. Yet, admitting all this, I fail to discern in it anything discrediting their testimony to challenge comparison with that of the noble Baron. Still less do I perceive in it any warrant for the attack which the learned counsel had made upon them. He has successively called them fellows, hobo witnesses, rogues, scoundrels, liars, sneak-thieves, perjurors, unconvicted felons, vultures attracted by a carcass, low comedians of perjury, men who should be in the penitentiary, "witnesses who can be bought like a bunch of asparagus." The virulence with which they have been assailed has, I feel confident, no parallel in the annals of the bar of this State.

Against two of the witnesses the learned counsel has fulminated the special thunderbolts of his vituperation—Bailey and Jewell. Of Bailey, he has been pleased to tell you that, if the police records were searched, it would be found that some of his long absences would be accounted for, and that during his short stays an unconvicted felon was about; that if he were the Chief of Police, and a

VON SCHROEDER vs. SPRECKELS

burglary were committed, he would arrest Bailey at once on suspicion; that his look was of the kind that one meets in docks of courts and in prison cells; that a man with such a face should be in the penitentiary.

Where is the warrant for all this vilification? Bailey's deposition was taken on the 26th of June last—six months ago. The learned counsel was present. To that deposition he has referred here in his cross-examination. Did Bailey at that time say anything different from what he has said here? No. I am warranted in saying that he did not; because, if he had, the learned counsel would promptly have referred to the deposition and confronted him with the discrepancy. Bailey, then, related, six months ago, in the presence of the learned counsel, the same story which he has testified to here. That, if the scene which he describes really took place, it holds up the plaintiff to the scorn of every right-minded person no one doubts. The plaintiff, then, had six months before the commencement of this trial to investigate into the character and antecedents of a witness whose single testimony, if true, is fatal to this case. If that witness's name could be found in the criminal records of the police department, the learned counsel would have found it, and would have proved that it was there. If he had really been an inmate of a house of punishment, the record of his conviction would have been produced. If he had ever been a fugitive

ARGUMENT

from justice, that fact would have been shown. If his reputation is bad, he would have been impeached. But nothing of the kind has been attempted. Bailey is not a criminal. He is not a fugitive from justice. His name is not on the prison-books. His past life has not been such as the counsel has denounced. His character in the community is above reproach. He is secure in his integrity against all attacks save one—denunciation made at a time and place when he is powerless to answer it. When the heat of the contest shall have passed, and calm reflection resumed its sway, I feel convinced that the learned counsel will be the first to acknowledge that it is hardly generous to heap vituperation, unwarranted by proof, upon the head of one who, if he should rise to protest against its injustice, would expose himself to punishment for contempt.

Jewell has also been made a special target for the learned counsel's shafts. His testimony, also, if true, constitutes in itself a complete justification of this publication. He, therefore, must be got rid of in some way. And what is the way? He is denounced as a man without character. Upon what evidence? To prove that he does not bear a good reputation among his neighbors two witnesses have been produced. And who are they? Do you remember, gentlemen, the elder Murray? An old man tottering upon the brink of the grave, he is asked the simple question whether he is the father

VON SCHROEDER vs. SPRECKELS

of another witness, who has just sworn he is his son, and he answers with a leer: "I suppose so; but you know a man can never be sure of those things." And this is said within a stone's-throw of the house where the mother of this son is still living. Is such a man competent to impeach the reputation of any one? A man whose innate perversity and ingrained suspiciousness would make him cast a doubt upon the paternity of his own child, assail the fidelity and drag into the mire the character of his gray-haired wife,—he impeach the reputation of any one!

This man and his son—and you recall the proverb, which time approves true, "Like father, like son"—are the only ones whom, after the most exhaustive canvassing, the plaintiff has been able to bring forward to testify against Jewell's reputation. This, taken in connection with the fact that they are both at this very moment in the employ and pay of the plaintiff as coachmen, and the fact that, out of a community in which Jewell has spent thirty years of his life, only these two can be found to breathe a word in disparagement of his character, and the further fact that witnesses of the highest respectability and standing have come here to support his good name,—this, I say, justifies me in declaring the attempted impeachment of Jewell as unwarranted and unjustifiable.

But, why this denunciation of the witnesses? Why call them names? Why traduce them as per-

ARGUMENT

jurors? Why—when there is no denial—no attempt even at denial—of the substantial truth of their testimony? Let me briefly rehearse the things which they have testified to that are not denied.

Take first what has been said with reference to drinking. What, upon that subject, does the plaintiff deny? Does he deny the bouts at the club-house, where heavy drinking was nightly indulged in, with married and unmarried women as his companions? Does he deny that the feasting was often prolonged far into the early hours of the morning? Does he deny that one evening, at an hour past midnight, one of the party, a young girl, fell fainting from her chair, and had to be placed under the charge of a physician? No; none of these things does he deny.

Take next what has been said about the gambling. Is that questioned? Is it denied that the plaintiff was a member of these gambling assemblages with women, which, commencing early, were prolonged until dawn? Is it denied that drink accompanied the play? Is it denied that, on one occasion at least, the lights were not put out until the hotel management had issued peremptory orders that they must be? No; none of these things are denied.

Take lastly the plaintiff's conduct toward women. Examine first the episode testified to by Jewell. Is not every essential circumstance of this episode confessedly true? Is it true that on this

VON SCHROEDER vs. SPRECKLES

occasion, at about half-past ten at night, the plaintiff ordered a carriage to be brought outside the hotel grounds to a secluded spot, where he could meet it unseen? He does not deny it. Is it true that the party, consisting of himself, with a female companion, and a bridegroom with his bride, got into the vehicle and ordered the driver to await their return? He does not deny it. Is it true that, as they started, the bride, referring to a couple who were to join them, said to the driver, "You tell Baron Alex, when he comes up, to follow us to Fairfax Villa," and that he added, "Tell him that he will find us at Pastori's"? He does not deny it. Is it true that they drove to Pastori's? He does not deny it. Is it true that the rig returned, at about one o'clock at night, with the bridegroom and the other woman, and that he and the bride remained behind? He does not deny it. Is it true that he and the bride did not start on their way back until her sister went after them and forced them to return? He does not deny it. Is it true that he came back to the hotel, after three o'clock in the morning, in company with his brother, the bride and her sister following in a separate vehicle? He does not deny it. Is it true that each couple entered the hotel by separate side entrances? He does not deny it.

Furthermore, he does not deny the frequent visits, during the absence of her husband, to the married woman's room, as testified to by the witness Raymond O'Neill. He does not deny that

ARGUMENT

the drinking parties, composed of himself, his brother, and the two women, after having commenced the evening together in one room, often separated, each pair thereafter occupying a separate room, as testified to by the witness Gus Lally. He does not deny that on one occasion, when the waiter came in, a married woman was standing by him, he having his arm around her waist and calling her endearing names, as testified to by the witness Bernard Peters.

What, then, of all that has thus been testified to by these witnesses upon the subject of drinking, gambling, and conduct toward women does the plaintiff deny? Simply that on any of these occasions the women were intoxicated. He thinks, it would seem, that he negatives the impropriety, wipes away the sin, and restores the bloom of maidenhood and virtuous matronhood to the cheeks of his female companions when he draws the line at drunkenness.

Comment upon this attitude is difficult to make within the bounds of moderation. Concede, if you please, that the women stopped short of intoxication—does that mitigate the scandalous character of these debauches? What is the condition of a woman who has spent the night in a club-house drinking with men? What is her moral worth? What value do you set upon the virtue of that young girl who, in one of these carousals, fell, after midnight, fainting from her chair? Admit, if you

VON SCHROEDER vs. SPRECKELS

please, that at the gambling parties none of the women were under the influence of liquor—what say you as to the propriety of these gambling scenes? Grant, if you please, that on the occasion testified to by Jewell the bride, when she returned to the hotel, after three in the morning, was not flustered with wine—how does that change the essential character of the happenings of that night? What is your judgment upon the conduct of the man—a man of mature years, prominent position, bearer of a title which, in his country at least, is a badge of distinction and a pledge of honor—who took the lead in these orgies? Do you set upon it the seal of your approval? Do you adjudge the journal which held it up to public censure deserving of punishment?

I desire now briefly to invite your attention to certain facts which, I venture to think, bring out in still bolder relief all that I have said.

In the first place, it is a significant circumstance that the plaintiff has not called General Warfield as a witness. That the learned counsel deemed it important to have it appear that the General controverted the facts stated in the article in question is manifest. For that purpose he offered in evidence, and in his argument dwelt at great length upon, an alleged letter published in the *Bulletin*, which, it is said, the General wrote as a denial of the facts stated in the *Call's* article. As to this, let me remark, in the first place,—and, if your Honor will

ARGUMENT

permit, I now ask an instruction to that effect,—that there is not a particle of legal evidence to show that General Warfield ever wrote that letter. The letter's superscription is "My Dear Sir," and its subscription "Believe me, Very truly yours"; its author professes amazement and regret at the publication in the *Call*; it comes apparently from a friend; it is directed to the plaintiff. If he has received such a letter,—if such a letter exists,—why does he not produce it? And this leads to the question, Why is not General Warfield called as a witness? If the plaintiff's conduct at the Hotel Rafael during his management there was such as to give no scandal to the guests; if his behavior was courteous and respectful to ladies, no one better knew it than the General. Why, then, is he not called?

The learned counsel retorts by asking why we did not call him. That question, I respectfully submit, it is not difficult to answer. What need had we of his testimony? What controverted fact could he have helped us to establish? He might, it is true, have corroborated Mr. Leake and Mr. Raymond as to the interview at the California Hotel. But the testimony of these gentlemen is not impugned. He might also have corroborated Mr. Perkins as to the interview at the Hotel Rafael. But Mr. Perkins's statements are not questioned. Why, then, corroborate, when the learned counsel admits?

Another significant circumstance is, that while this is a suit to recover damages for an injured

VON SCHROEDER vs. SPRECKELS

reputation, and while the plaintiff has set upon that reputation the high value of a quarter of a million, he has not called a single witness to prove that he had a reputation to lose. From the broad circle of acquaintances, which, by virtue of his position, of his wealth, and of the standing of the family into which he married, he must have made, and from the number of associates and friends among whom he spent his life, you would naturally expect to see some one come forward to bear witness to his good reputation. Yet none has come. No, not from the inhabitants of San Rafael, among whom he lives, and with whom he has constant dealings; not from the fashionable companions with whom he has wined and played and feasted; not from the families into whose homes he was received as an inmate, does a single one appear to rebut the implication that, as Mr. Perkins stated to Mr. Leake, his reputation in respect to women was bad—very bad, indeed.

In this connection, let me call your attention to the fact that the plaintiff, through his counsel, objected to our proving the Palace Hotel incident of the 10th of October, in which he was involved. Would a man of spotless reputation have availed himself of a technical right to exclude that testimony? Does an honest man, offering for sale what he represents to be gold, object to the purchaser's subjecting the metal to every test by which its purity may be assailed? Does an honest man, proposing to sell a horse as sound, refuse the purchaser's

ARGUMENT

request to submit the animal to the inspection of a surgeon? Then, why did the plaintiff lay hold on a technicality to exclude the testimony of Ackergren, the night-watchman, called by us to prove the episode of the Palace Hotel?

And now, gentlemen, if those things which have been testified to by witnesses whose veracity is not attacked and whose testimony is not contradicted be true; if those things which, though coming from assailed witnesses, are not denied be true; if those things which, by irresistible inference and unerring deduction, are drawn from conceded facts be true,—then, I ask you, are they not sufficient to establish the substantial correctness of the statements of the article in question? Do they not prove that the conduct of the plaintiff at the Hotel Rafael was that of a profligate? And if they do, then, in conformity with the legal principles to which I have referred, and upon which the Court will instruct you, we are at this point entitled to your verdict.

The learned counsel has vaguely hinted at certain results as likely to follow such a verdict. Appealing to your local pride, he urges that the ruin of the Hotel Rafael, and consequent loss to this town, must flow from such a determination of this cause. I do not believe, gentlemen, that any one of you has any apprehension of such an outcome. No one, I am confident, doubts that, under a changed and proper management, this hotel will continue to be in the future, what it has been in the past, a

VON SCHROEDER vs. SPRECKELS

favored spot for those seeking in the country recreation and rest from their labors in the city.

But, if that resort is to be conducted in the future as it has been in the past, if the plaintiff is still to cast over it the shadow of his presence, then, if a verdict in favor of the defendant shall have the effect of barring its doors against a single reputable woman, I appeal to you as members of this community, as husbands of honorable wives, as fathers of virtuous daughters, to welcome the result. Let the consequences apprehended by the learned counsel come. Aye, let the house be fired by the torch of the incendiary, until naught but a heap of smoldering ashes remains, rather than that girls of tender age shall continue to drag their vestal robes through the slime of its midnight orgies, until overcome with wine they faint, surrendering the treasures of their purity, into the arms of heartless seducers. Let the tornado with its whirling arms seize upon the structure and scatter it to the winds, rather than that matrons shall continue to spend their nights in its gambling-rooms, and, amid the rank odors of tobacco and the maddening fumes of wine, squander the fortunes of their absent husbands. Let the spot be blotted out until its very ruins shall have perished, rather than continue to be a haunt from which the young bride, her lips still tremulous with vows pronounced at the altar, her brow still bound with the blossoms of her hymeneal crown, shall be taken out at midnight to adulterous assignations,

ARGUMENT

and brought back with the dawn to dishonor with her polluted body the bed of the unsuspecting bridegroom. Aye, let it perish, and this community will be all the healthier, all the stronger, all the better for it.

But why ascribe such overweening importance to the permanency of the place? Stately and graceful as are its structures, picturesque its gardens, delightful its arbors and its groves, what are they in comparison with the surrounding nature, in whose majestic presence they dwindle into nothingness? The plaintiff may have it in his power to destroy what man has fashioned into artificial beauty; but, even thus, the hand which yearly clothes these valleys and hillsides with verdure, plants the stately redwood and broad-spreading oak upon the slopes and ravines of yon mountains, and weaves at morn the misty wreaths that encircle the brow of Tamalpais will not cease to lavish its gifts around you.

Of the results upon the plaintiff of an adverse verdict what shall be said? Of his condition I would speak in terms of moderation. His state is, indeed, one which must excite the pity of every generous heart. Young, gifted, a nobleman in his own country, an officer of distinction in a gallant army, he came among us to wed one of the most lovable of our daughters. Confiding in his manhood and the chivalry which his rank seemed to avouch, she intrusted into his hands the ample fortune which her father had amassed. How has he repaid her

VON SCHROEDER vs. SPRECKELS

confidence—how requited her love? Where is she now? Where the children with whom she has blessed his home? Exiled from the land where she was married, exiled from the land where they were born, exiled from the land where the life of her father and their grandsire had been spent and where his ashes are buried! Where are the holiday friends who flocked about him during the brief sunshine of his factitious prosperity? In this his hour of supreme trial, do we see them gathering about him? Do they accompany him here to speak into his ear the language of confidence, of solace, or of hope? No. Armed bullies and hired ruffians may follow his footsteps as a guard against the vengeance of outraged husbands, brothers, and fathers—friend there is none!

Unfortunate man! Your course among us has been strewn with wrecks. Your position is redeemed neither by the performance of great public services, nor by the achievement of eminent success in any walk of commerce, industry, or learned profession. Hope not, therefore, to take up here the broken thread of your life. Hope not by repentance, however sincere, by amendment, however persevering, to carve out in this State a new career. Return to your own country. Return to that land in which the distant waves of this sea of scandal may not yet have undermined your standing. Prostrate yourself at the feet of that wife whom you have wronged. Out of the abundance of her love ask

ARGUMENT

forgiveness. Resume the place in that great army which your title and your rank confer. Go forth, if you may, to fight the battles of the Fatherland. Go forth to unfurl the imperial standard, and extend to the uttermost bounds of the earth the sway of Germany's civilization and conquests. Blot out by your future conduct the memory of your past shortcomings. By your own deeds win back a new reputation. Do not tarry here, vainly awaiting what cannot be accorded you—a verdict against the evidence and the law. The province of the jury is justice. Mercy and forgiveness are not theirs to grant. At the hands of a higher power must these be sought. And, perchance, in the time to come, when suffering shall have purified your soul and noble deeds shall have regenerated your life, kneeling, your children and grandchildren about you, beneath the dim-lit arches of some mediæval cathedral, as the white-robed priest, prostrate before the altar, implores God to remit the trespasses of mankind, you, too, may breathe a prayer, invoking the mercy of Him who told the erring woman to go and sin no more, in the hope that "he who loved like Magdalen, like her may be forgiven."

TO A TRIAL COURT

AMONG the many notable will-contests which have been tried in California, none, perhaps, has a more remarkable history than that in which the following argument was made. The testator, George H. Parker, died in his seventy-sixth year, in the county of Santa Clara, leaving an estate valued at over a quarter of a million dollars. He had made a will, wherein, after minor bequests, he devised the whole of his estate to trustees in trust for his only son, Edward L. Parker. The terms of the trust were, in substance, that the trustees should pay over to the son during his lifetime the whole income of the property, and in case his wife died before him, then at once to convey and transfer the property to him outright; but if his wife survived him, then to convey the property to third persons. The testator died on the 17th day of August, 1893, and his will was probated on the 14th day of the following month. His son survived him but a few months, dying on the 14th day of December of the same year, leaving his wife as his only heir. The latter in due time instituted proceedings to revoke the probate of the will. The contest was three times heard before a jury. The first trial lasted from the 19th day of May to the 1st day of July, 1896, resulting in a disagreement of the jury; the second lasted from the 1st day of September to the 11th day of November, 1896, resulting in a verdict against the will on the ground of unsoundness of mind. A motion for new trial was at once made by the respondents. This motion was granted and a new trial ordered. The case was heard for the third time, the trial commencing on May 3d and ending on August 5, 1898. Again the jury found against the will,—this time on the ground of undue influence. A motion for new trial was again made by the respondents. This motion was granted on November 13, 1899; and thereupon the contest was abandoned.

In all these proceedings, Mr. Delmas appeared as counsel for the respondents. The following argument was made by him in support of the first motion for new trial, in the Superior Court of Santa Clara County, sitting in banc, on the 12th and 19th days of February, 1897.

CONTEST OF PARKER'S WILL

MAY IT PLEASE THE COURT: This, as your Honors have already been informed, is a motion for a new trial of an issue submitted to a jury in a proceeding to revoke the probate of a will. The outline of the proceedings to which it is proper to call attention, in order to make my argument intelligible, may be given as follows:—

George H. Parker died in this county in March, 1893. A few weeks afterward, his will, with its two codicils, was duly admitted to probate. Within a year, the widow of his only son and heir filed a contest of the probate, on three grounds,—fraud, undue influence, and unsoundness of mind. Upon a challenge of these grounds by the parties interested under the will, the issues came on to be tried before a jury, in September last. At the close of the contestant's case, the Court withdrew the consideration of the issues of fraud and undue influence, on the ground that there was no evidence to support them. Upon the only remaining issue the jury found against the will. In due time, the respondents filed their notice of intention to move,

ARGUMENT

upon the minutes of the Court, for a new trial, on the ground of insufficiency of evidence to justify the verdict. It is my object to support that motion.

I take leave to state at the outset that while the verdict, when rendered, struck me with astonishment, yet, upon calmer reflection, I am convinced that the result of the trial was such as might well have been anticipated. It was not, after all, contrary to our experience at the bar that a woman of no uncomely appearance, who, if her story was to be believed, had for twenty years been the loving, dutiful, and self-sacrificing wife of the only son of the deceased, and who in widow's weeds besought, through sobs and tears, charity for the errors of her earlier life, and, by the lips of ingenious and eloquent counsel, implored her judges not to inflict upon her the double stigma of poverty and of shame,—it was not, I say, contrary to our experience that such a one, even by artifices such as these, stale and threadbare however they might appear to us, should play upon the unsuspecting sympathies of twelve ingenuous men, and hurry them, against the law and the evidence, to an unconscious violation of their oaths. Besides, it might, upon broader grounds, have occurred to the mind that jurors habitually deal lightly with rights vested under wills, and, under the guise of justice to the living, cloak their disregard of duty to the dead and disobedience of the law.

Indeed, it might not be unprofitable to advert

CONTEST OF PARKER'S WILL

here to the character of the right to make a testamentary disposition of property, the attitude of courts toward that right, the habitual disregard of it by juries, and the reasons which bring about that result. Some lesson might be drawn from such considerations helpful, perhaps, to admeasure the true value of the verdict here rendered.

The history of jurisprudence teaches that the inception of the right of testamentary disposition is coeval with that of property itself, and that, springing up at the same time, together they have existed and developed throughout all successive advances of civilization. So immemorial is its origin, so universal its recognition, that it has long since been looked upon as incident to the very conception of property itself, and as equally essential to its enjoyment as the right of gift or other free alienation during life. Contemplated from the standpoint of public policy, the recognition by the State of the power of him who in life was deemed the best judge of the management of his property to dispose of it according to his wishes after death must appear founded upon the highest wisdom. It is recognized as an efficient means of individual self-protection; and in the jurisprudence of all civilized countries its objects are best subserved by leaving its exercise to the unfettered judgment and will of each individual owner.

Such being its nature and value, it would appear at first blush strange that the popular branch of our

ARGUMENT

tribunals should be the one which can ever be most successfully called upon to do violence to the exercise of a right which affects each member of that tribunal equally with every other individual in the community. Yet the fact is notorious that it is to jurors, all of whom, upon their *voir dire*, may have sworn—all of whom, upon their general oath to obey the instructions of the Court, have certainly sworn—that they recognize in a testator the right to dispose of his own according to his wishes,—it is to jurors, I say, that appeals are daily made with success to set aside the wills of the dead, not upon any substantive ground recognized by law, but because their provisions may not conform to their own particular views of propriety or justice.

This tendency has been the subject of much judicial comment and the cause of strictures made in general disparagement of the jury system. I venture to think, however, that these animadversions may not be wholly deserved, and that the verdicts given may be explained upon grounds which in no wise affect the integrity of jurors nor warrant any general attack upon the value of the trial by jury. The experience of every one of extended practice in *nisi prius* courts teaches that jurors are, as a rule, actuated by a desire to do right, and that, as a rule, their verdict represents the conclusion which commends itself to their sense of justice. This observation holds good, I think, even in cases of wills. Upon a view of all the circumstances of

CONTEST OF PARKER'S WILL

the case, jurors become impressed with the conviction that, from their standpoint, a will is just or unjust, and their verdict voices that conviction. In whatever shape the result of their deliberations may be announced, it represents at bottom nothing more than the conclusion reached upon the question of the fairness or unfairness of the provisions of the will. It is very much as in the criminal prosecution of a man who has slain the seducer of his wife or daughter, where a verdict of acquittal or conviction on the plea of emotional insanity is in reality nothing more than an expression of the jury's approval or disapproval of the homicide.

The difficulty is that, in the case of wills, the jurors' sense of justice affords no guide for determining whether the will should, in law or in morals, be annulled. The reasons for this are obvious. In the first place, the jury never can have fully revealed to them all the elements of fact which operated upon the testator's mind in determining the disposition of his property; and, in the next, if competent to make it, the testator is by law constituted the sole judge of the justness of his will. Speaking of the disposition of property, the Supreme Court of Missouri said:—

“It was for the testator to say, from his own standpoint,—where no one else could stand,—knowing what he knew, and feeling what he felt . . . how it should be given.” *

* *Maddox vs. Maddox*, 21 S. W. 502.

ARGUMENT

Says our own Supreme Court:—

“ It is well to remember that one has a right to make an unjust will, an unreasonable will, or even a cruel will. Generally, such questions turn our thoughts, as they are often intended to, from the only question at issue, which always is only, Is the will the spontaneous act of a competent testator? Of course, juries lean against wills which to them seem unequal or unjust. But the right to dispose of one’s property by will is most solemnly assured by law, and is a most valuable incident to ownership, and does not depend upon its judicious use. The beneficiaries of a will are as much entitled to protection as any other property-owners, and courts abdicate their functions when they permit the prejudices of a jury to set aside a will merely upon suspicion, or because it does not conform to their ideas of what was just and proper.” *

The same Court, *in re Spencer*, said:—

“ Even if we could consider the will as unjust, it would make no difference. In disposing of her property she [the testatrix] was not called upon to consult the wishes or views of juries or courts; her own will was supreme.” †

And in the still later case of Langford it was said :—

“ As the law now stands, that right cannot be frittered away after the death of the testator, according to the tastes and notions of others. It is quite

* *In re McDevitt*, 95 Cal. 33. † 96 Id. 453.

CONTEST OF PARKER'S WILL

likely that in the case at bar the provisions of the will did not meet with the approval of the jurors; but their approval was not necessary." *

In the practical administration of justice, the result of these observations, if they are correct, would be to warrant not a general carping at the jury system, but the exercise of the undoubted powers of the court to scrutinize verdicts, and to correct them whenever it is manifest that they have been arrived at under a mistaken conception of duty.

In the proceedings now before us, whatever justification, from the standpoint of their ideas of justice, the jury might have fancied they had for disapproving of the provisions of the will, I contend, and shall endeavor to show, that, according to the rules of law and the evidence, they had none for finding the testator of unsound mind.

The issue of unsoundness of mind was presented to the jury under the aspect both of partial insanity, born of specific delusions, and of general unsoundness, resulting from imbecility or dementia. These I purpose separately to examine.

Can the verdict be supported upon the ground of partial insanity consisting of insane delusions? This was the ground insisted on in the argument on behalf of the contestant to the jury. It was the ground presented in the instructions of the Court, given at contestant's request, upon which the verdict

* 108 Cal. 626.

ARGUMENT

was based. Indeed, while the evidence relating to general unsoundness, consisting of the opinions of intimate acquaintances, was relied on to avoid a nonsuit, and doubtless will be here again relied on to support the verdict, partial insanity or delusion formed the only theme of the argument of counsel and the instructions of the Court. I will now, therefore, proceed first to consider it.

Many definitions of delusion will be found in the books. As it is not my object to include within any of them the facts of this case, but, on the contrary, to exclude them, it will not be necessary for me to read or comment upon these general definitions. It will suffice to state the rule by which a certain mental condition may be shown not to be a delusion, and to demonstrate that the facts of this case are covered by that rule.

Whatever other elements a belief may possess, it is, according to all the authorities, not a delusion if it is found to have the following characteristics: First, if the thing believed is true; secondly, if the belief, though untrue in fact, is based upon evidence, however slight, from which, by the use of the reasoning faculties, however illogical the process, the conclusion adopted has been drawn.

As to the first characteristic, it can hardly be necessary to devote much time to it; for it is obvious that to believe the truth can never be a delusion, the very essence of which is that it is a false belief. "Delusion," says the Court of

CONTEST OF PARKER'S WILL

Appeals of New York, "is insanity where one persistently believes supposed facts which have no real existence except in his perverted imagination." * "All the authorities to which I have had access," says Judge Redfield, "agree that to constitute a delusion there must be a belief in the existence as a fact of something which does not exist." †

As to the second characteristic: "A belief," says Judge Redfield, "based upon evidence, however slight, is not delusion, which rests on no evidence, but upon mere surmise." ‡

In Tittel's Estate, a most accomplished probate judge thus charged the jury:—

"Belief based upon evidence, however slight, is not delusion. One person from extreme caution, or from a naturally doubtful frame of mind, will require proof before acting, amounting, perhaps, to demonstration; while another, of different faculties, but of equally sound mind, will act upon very slight evidence. . . . If she [the testatrix] believed, . . . and any fact existed as a foundation for that belief, she was not laboring under delusion, and the script is her will, however much she might have been mistaken in the conclusions at which she arrived. . . . A person may act upon weak testimony, yet be under no delusion." §

* *In re White's Will*, 121 N. Y. 406.

† 1 Wills, p. 86.

‡ 1 *Id.*, *ibid.*

§ *Myrick Rep.*, p. 14.



ARGUMENT

Says the Supreme Court of Oregon:—

“Delusion is that which springs spontaneously into the mind in absolute independence of process of reasoning.” *

Upon the trial, Parker was charged with having entertained certain specific delusions. It was claimed and argued,—

First, that he entertained an insane delusion that Emma L. Parker, his son’s wife, was an adventuress, who would squander her husband’s money and turn him out of doors;

Secondly, that he entertained an insane delusion that his son was a drunkard, a spendthrift, and was unworthy of his bounty;

Thirdly, that he entertained an insane delusion that Emma L. Parker was supporting a man who was a counterfeiter and a gambler and a *roué*, and for that purpose was stealing money from her husband’s store;

Fourthly, that he entertained an insane prejudice respecting his son and his son’s wife.

If these be examined in the light of the law and the evidence, it will be found either that Parker did not entertain the belief at all, or if he did, he did so under circumstances which demonstrate that it was not the spontaneous product of a perverted imagination without evidence to support it. In contending that every element necessary to consti-

* Smith vs. Smith, 25 Pac. Rep. 18.

CONTEST OF PARKER'S WILL

tute insane delusion is wanting in the alleged beliefs of Parker, I shall try to show that,—

First, his belief in relation to Emma L. Parker was not only based upon information which he possessed in regard to her, but was, under the circumstances in which he was placed, perfectly rational;

Secondly, his belief as to his son's improvidence and drinking was based upon reliable information communicated to him; and he never considered him unworthy of his bounty;

Thirdly, his alleged belief as to Emma L. Parker's entertaining a man is not shown by the evidence to have been harbored by him;

Fourthly, his prejudice against his son's wife was fully justified by her character and conduct. And prejudice against his son he had none, but the tenderest affection, instead.

Examine in the first place the alleged delusion of Parker touching the character of his son's wife.

It is charged as a delusion that he believed that his son had married an adventuress. That he entertained such a belief and frequently gave expression to it admits of no doubt. But was it an insane belief? It was not, if it was true; nor if, though not true, it was based upon information received by him, from which, by the use of his reasoning faculties, he reached that conclusion; nor, *a fortiori*, if the information was such that it would have led any rational man to the same conclusion.

ARGUMENT

It is not necessary for the purposes of this argument to contend that Emma L. Parker was, in point of fact, at the time of her marriage to Edward an adventuress. It will suffice if I shall succeed in proving that the information which George H. Parker received concerning her after that event was sufficient rationally to induce him to believe that she was. In order to understand the opinion which he formed of her, it will be useful to take a brief retrospect of the relations he bore toward his son.

That the testator loved his son has been amply proven by the testimony of the contestant herself. But, regardless of what she says, the facts abundantly attest that love. In 1870—himself then by no means a rich man—he started his son in business, with a cash capital of ten thousand dollars. From that on until his death he made him, from time to time, further advances, amounting to more than a like sum. When, in 1874, he learned of what the family conceived to be his unfortunate marriage, he crossed the continent in order to investigate the matter and give him the benefit of his paternal guidance and advice. Though himself living in California, he visited him in Hartford from the time of his marriage until his death, every two or three years, and on these occasions was for weeks his constant companion. When, in 1894, he learned of his sickness, he, though at the time past seventy-six, made a journey of twice three thousand miles

CONTEST OF PARKER'S WILL

to see him. Finding him stricken down, he then furnished him all the funds necessary to procure every comfort, and, in order that he might not be harassed with business cares, met and canceled his obligations at his bankers. Though convinced that by his unfortunate marriage he had ruined his life, he continued to love him to the last.

Nor do the provisions of this will denote any other feeling than that of parental solicitude. The testator had no wish more fondly cherished than that of giving to his only son all he had in the world. The very restrictions which he placed upon the bequest to him were only calculated, in view of the circumstances surrounding him, to make the gift effectual. They were intended not to prevent, but to secure, the enjoyment of the gift. After making such charitable and benevolent legacies as were proper for a man of his condition, he devised the whole of his estate to his son, on the single condition that he should survive his wife. During her life he secured to him the whole of the income of his property, and empowered his trustees, if that income proved insufficient for his proper maintenance, to use the capital itself. The reason of these restrictions was that, first, he did not deem it wise to give his son the property absolutely during his wife's lifetime, because she was, he believed, a woman who would squander it and leave him when poor; and secondly, if his son, having the property, should die, she as his heir would inherit it, and this,

ARGUMENT

he considered, she did not deserve, and he by no means wished.

That these views were adopted after mature deliberation, and were adhered to with unswerving tenacity, is shown by the fact that they were embodied in every will he made. His hostility toward the wife arose from the fact that he considered her an adventuress who had inveigled his son into an unfortunate marriage, and had thereby ruined his life; that she was a woman whose past life had been dishonored by misconduct, and whose present career was guided by hypocrisy.

It is claimed that these opinions of the testator were insane delusions. In order to understand whether they were or were not, a brief sketch of the character of the man who entertained them, of the training, education, and business career of his son, and of the circumstances under which the contestant came into the family is necessary.

The testator was born in Connecticut. In early life he was an artisan, working as a clockmaker in Hartford, side by side with Noah Pomeroy. The acquaintance led to a marriage between Noah and his sister Jane. He himself married in 1841, and had as issue one only child, who was named Edward L. Parker. His wife dying in 1851, he and his son became for five years members of Noah Pomeroy's household. At the end of that period, he remarried, taking as wife Noah's niece, Delia Pomeroy. The couple came to California in 1858,

CONTEST OF PARKER'S WILL

leaving Edward in Jane's charge. After engaging in farming here for about two years, he returned East in 1860. In 1865, he came back to California, again leaving Edward with his sister Jane.

From that time on Edward became a member of Noah's family, being treated as the adopted son of the childless couple. They sent him to school and to the best business colleges. When his education was completed, they secured him a position as a clerk, in which he remained until 1870. He then came to California to visit his father, returning with him the same year. His father then set him up in business in Hartford, furnishing him a capital of ten thousand dollars. Though now in an independent position, Edward still made his home with his aunt Jane. The Pomeroy's being very wealthy, and the young man, as their presumptive heir, moving amid luxurious surroundings, became somewhat fast, a member of clubs, a frequenter of the race-track, having, while his home was still with his uncle and aunt, sleeping apartments down-town, in a building of questionable character. Such was the condition of Edward Parker in 1873, when he first met the woman who was destined to be his wife.

Who at that time was the contestant? Of her past life and history, beyond the fact that she was born in 1851, that her maiden name was Emma Huff, she herself, though repeatedly questioned, has steadfastly declined to speak. She would appear before us in the attitude of a respectable woman, yet

ARGUMENT

her antecedents she herself keeps under veil. Called upon to believe the diamond of the purest water, we must not be allowed to subject it to any test. Assured that the fabric is of the finest texture, we must purchase it upon trust, and will not be permitted to examine it or touch.

This much, however, we have succeeded in proving: In 1870, she was living somewhere in New York,—where cannot be ascertained from her. She was the companion of a Mrs. Lowe, who in early days had left home to come to California under a false name, passing herself off as a married woman, and had then returned to New York, there to follow such vocation as beseems such a character. Emma Huff herself came to this State in 1869 or 1870, being then in her eighteenth or nineteenth year. Before starting she wrote to her mother that she was married to a man named George L. Brown. She came alone, taking lodgings somewhere in San Francisco,—where she cannot be persuaded to tell. She then met a man named Tillinghast,—a club-man and high liver,—and frequented with him, and in company with other men and women, restaurants whose name and location she now finds it convenient to forget. What her relations with this man were may be vaguely gathered from the fact that, though not married, she brought back to her home his photograph and represented him to her family and to the world as her husband. San Francisco appearing too dull to her enterprising spirit, she

CONTEST OF PARKER'S WILL

went to Virginia City. Of her life there we know absolutely nothing. She declines to be interrogated upon it. What it had been we may conjecture from the fact that in 1874—after her marriage with Edward—a man named Mitchell, who had been with her a resident of that city, came to visit her in her home in the Pomeroy mansion in Hartford; that she introduced him to the family, falsely representing him as her agent, engaged by her to settle up her dead husband's estate; and that he was overheard, in a confidential conversation with her, to say, "Now, Emma, that you have married into a good family, behave yourself." In 1871 or 1872, she returned to her home in Plantsville, in deep mourning—mourning for the dead husband whose photograph she carried and whose name she had given as George L. Brown.

In 1873, in the beginning of the winter, Edward L. Parker first met her. The meeting was characteristic, and a foreboding of the events which were to follow. She came to Hartford in company with a woman whom she herself has represented as of no reputable character. According to her story, while she and this woman were at the hotel called the Allyn House, Edward and a friend named Stanton, total strangers, called upon them, introducing themselves, and at once invited the couple to a ride and supper in the country. They went. Upon their return, she visited Edward's down-town sleeping apartments, leaving there some time in the

ARGUMENT

night. Her companion was then a widow, and she represented herself as such. From that time on, she had frequent meetings with Edward at his apartments, but never at his home. Their courtship, if courtship it may be called, lasted eight months, during which she never was introduced by him into the Pomeroy family, nor he by her into her own. He was brought at last to the point of consenting to marry her,—by what means the evidence does not leave in doubt. She represented herself to him as a widow from California,—relict of George L. Brown,—rich, and on the point of returning. He believed her story. About a fortnight before the marriage, he advised his uncle Noah and aunt Jane, telling them that his marriage must take place inside of two weeks; that he was to marry the widow of George L. Brown, of San Francisco, who had died in the Occidental Hotel, in that city. When they remonstrated and pointed out to him that he was in no condition of fortune to marry, he replied that she was a woman of means, had property, was rich; that he must marry her right away, as she had presently to go back to San Francisco, and he would lose her.

The marriage took place in New York, on the 26th of June, 1873. There is no evidence—except her own statement—that any of her family knew of it. Certain it is that no member of that family was present. None of the Pomerroys, nor any other relative of Edward, was there. George

CONTEST OF PARKER'S WILL

H. Parker, the father, was never even apprised of the coming event. No one witnessed their union, except Edward's friend Stanton, who had accompanied him on his first visit upon her in the Allyn House. She represented herself to the minister who performed the ceremony as the widow of George L. Brown, giving her residence as San Francisco, and certifying that she was now married for the second time. Edward believed her to be such, nor was he undeceived until, as I shall presently show, some eight months had elapsed.

The very day of their marriage, they returned from New York to Hartford, going to the Pomeroy's. She was received kindly and treated considerately by all the household. This she herself is compelled to admit. She played the widow's part with a skill worthy of her former career in San Francisco and Virginia City. She still wore mourning for her departed husband, George L. Brown. Around her neck hung a locket graven with his initials. In her album on the parlor table was his photograph, ostentatiously exhibited to the servants and members of the family. She told where they had lived; spoke of their sojourn at the Occidental Hotel in San Francisco. She expatiated upon his munificence. She impressed them with his never-failing kindness. He denied her nothing, she said. She had her horses and carriages,—a span driven to the door every morning for her special use. She had all the money she

ARGUMENT

desired—he never left her side without showering gold into her lap. She intimated that they had traveled together far and wide in foreign lands. She described with elaborate minuteness every detail of his mournful taking-off at the Occidental. He had been suddenly taken sick, she said; she had run to the druggist's for assistance; on her return she had found the poor man dead, and herself left alone and desolate. To make the narration of his demise still more circumstantial, she pointed to a pin seen in the scarf of his photograph. She stated that, when he was suddenly taken ill, she had untied his neckwear to relieve him, and had taken off his scarf-pin and stuck it in a cushion on a bureau, where it had remained until his brother had taken it away.

She told of the ample fortune her dead husband had left her. She had lands and stocks, she said. She gave the very number of the house in which their home was,—411 Powell Street, in San Francisco. Nay, more, out riding one day in Hartford with Jane Pomeroy, she pointed out a house—that of a Mr. David Mayer—as very much resembling the one of her dead husband. So deep, however, she said, had been her grief for his demise that she had kept the house closed—she could not bear to live in it for a whole year after his death. She added that she had an agent in San Francisco taking charge of all her property, collecting her rents, gathering in the dividends from her mines,

CONTEST OF PARKER'S WILL

and—no doubt—scissoring off the coupons from her bonds. She complained of the expense, saying it cost her a great deal for a man to take care of her property, and pay the taxes and insurance. She introduced this very agent, in the shape of Mitchell, to the Pomeroy household.

That this story was a monstrous falsehood she now admits, and her counsel are forced to avow. The deception practiced upon the unsuspecting household of the Pomerroys was bound in the end to break down. It did break down. In the first place, the picture she attempted was overdrawn. It seemed to these practical New England people strange that a widow of but twenty years, in good health, plump and sleek, should take on so for the death of an aged husband—a man, she had stated, old enough to be her father—as to keep his house shut up for a year,—especially so when she, still in mourning, had contracted a new alliance with a younger man. Then it struck this frugal couple as odd that, while complaining of the expense of an agent to take care of her property, she had rejected their suggestion that her own husband's father should, free of charge, represent her interests in San Francisco. It appeared to them astonishing that she should prefer to go on continuing to pay commissions, of which she complained. Besides, while giving herself out as very rich, she was constantly importuning her husband for money for dress.

ARGUMENT

Then people began to drop in and whisper. Rumors reached the Pomeroy's that she was not perhaps of altogether too good a character. They began to grow suspicious and to make inquiries. Jane wrote to her brother George, under date of January 15, 1874, that they had heard that she was a woman of no character, and she wished that he would come and investigate for himself. She sent a copy of the photograph which the contestant had represented to be that of her deceased husband, George L. Brown, and also gave the number—411 Powell Street—of the house in which she had said she and her husband had lived in San Francisco. She concluded by requesting him to find out whether the facts so represented were true.

George's wife, Delia, answered by letter dated January 25, 1874, in which she replied that, upon seeing the picture, the photographer who had taken it stated that the original was a Mr. Tillinghast, a well-known man still living; and that further investigation showed that this man was even now carrying on the business of an importer in San Francisco. As regards the house on Powell Street, it was ascertained that no such person as Brown or the contestant had ever owned or lived in the place.

Noah showed this letter to Edward, and told him that it disclosed the facts as he understood them. When Emma came home that night, there was a stormy interview between her and her husband. She stamped the floor in rage, and called

CONTEST OF PARKER'S WILL

Jane all manner of vile names, threatening even her life. Edward, who had been as a son to Jane, restrained her, telling her that he would protect his aunt, and would not hear a word spoken against her. He furthermore informed her that she had deceived him—deceived him terribly; that she was no widow, and had no estate and no property. She retorted that she had told the truth, and that she would procure the certificate of her marriage. He replied that she could not. "You cannot get the certificate. I don't think you can get the certificate," he said. Noah was called in, and in her presence Edward said to him, "Uncle Noah, do you believe that man is living in San Francisco now which Emma has claimed was her dead husband, George L. Brown?" and Noah replied, "I do." Emma then exclaimed, "I will call on my God to paralyze me here and now if that is n't my dead husband in California." She said further that she would show her certificate within four hours. And she left the house, saying that she would go to New Haven that very night and procure it. While she was gone, Edward said, "Emma has gone to New Haven to get her marriage certificate," and Jane replied, "Do you think that she will get it?" Edward retorted, "No; because I don't think that she was ever married. She has deceived me. I don't think there is any marriage certificate to get. She has deceived me about her property. She has deceived me every

ARGUMENT

way." His condition is best described in the simple words of Jane, who says, "The man was about crazy."

She returned the next morning—or, at least, pretended to return—from New Haven, saying that the minister who had married them was dead. She asked for time to get her certificate from San Francisco,—for three months,—saying that she had a copy of it in her trunk there. She added that if she could not get it within that time, she would not ask her husband to live with her any longer, and would leave of her own accord.

This transparent falsehood may have deceived her husband. He may have believed the story. But Noah Pomeroy had too much knowledge of the world to be hoodwinked by such gauzy stuff. He ordered the couple to leave his house that very day, stating to Edward that its doors would always be open to him, but that the woman whom he had brought there, and with her so much disgrace, must never darken its threshold again.

Shortly after this, George H. Parker came East for the express purpose of investigating into his son's marriage and ascertaining for himself the true character of his wife. On his arrival in Hartford, he stated to his sister Jane that he had made investigations in San Francisco and found out that there was no such person there as George L. Brown; furthermore, that he did not think his son's wife had any property there on Powell Street,

CONTEST OF PARKER'S WILL

or anywhere else, nor any stocks nor bonds; that he had come to investigate Edward's wife, to satisfy himself what she was; that he was going to make his investigations personally.

On this mission he stayed in Hartford six weeks. He first called upon his son and his wife at the United States Hotel, where they were stopping. He found her at first pleasant enough. "He heard her story," says Jane, "and came back home and felt as if the woman had been damnably abused. He was going down the next day to see her again." On his return the next day, he offered, if she would make a true statement of her previous life, to take her and her husband to California, set him up in business, and wipe out the old slate. He told her if she would only tell him the truth of her past history he would stand by her, as she had married his boy. She admitted, with apparent frankness, that "she had lied to Noah and Jane, but would tell him the truth," and then told him that it was true "that she had married a man by the name of George L. Brown; that he lived at the Occidental Hotel in San Francisco, and that he died at the Occidental Hotel." She gave him on a slip of paper, in her own handwriting, the very number of the room and the date of his death. She added "that he was buried at Lone Mountain near the Broderick monument." She requested him to write to California himself and find out the truth. He wrote accordingly, and informed her

ARGUMENT

of the fact on his visit the next morning. She expressed her regret that he had not telegraphed, instead of writing, because, she said, "I have got to wait so long to have a letter go and come, and in this suspense, and I wish you had telegraphed." She further told him that she had property in San Francisco,—a house at 411 Powell Street,—and also mining stock. He wrote to his wife concerning these matters, and she answered by letter of March 6, 1874, in which she stated that she had gone in person to the house, 411 Powell Street, had inquired if any person by the name of Brown had lived there within the last three or four years, and had been answered by the lady of the house that she had resided there for the last nine years, and that no person by the name of Brown had ever lived there during that time.

He wrote to a friend in San Francisco, to ascertain whether George L. Brown had ever lived or died at the Occidental Hotel, and, as soon as his letter reached its destination, received a telegram in the following words: "No such man ever lived at the Occidental Hotel. A big lie. Letter by mail." After receiving this telegram, he called upon his son's wife and told her, "Here, I have got the telegram." She exclaimed, "Oh, I am so glad!" He showed her the telegram. She took it, read it, tossed it off in a chair near by, and said, "What do you suppose I care for that? I never told you my husband died at the Occidental Hotel." He

CONTEST OF PARKER'S WILL

said, "You did." She replied, "If you say that, you are a damned liar."

In due course of mail he received a letter from his friend, confirming with great minuteness of detail the former communication that no such man as George L. Brown had ever lived or died at the Occidental Hotel.

This letter ended his investigation into the character of his son's wife. He had ascertained enough to convince him that she was neither a truthful nor a worthy woman. To use his own forcible language, he had "found out that she was a liar, and he did not want anything more to do with her." From that time on, his opinion of her was irrevocably fixed. He saw clearly that she had absolutely dominated his son, and molded him to her will as clay in the potter's hand. He retired in sorrow, telling his son that if he wanted to live with her it was his privilege to do so, but that he must not look to him for support, as he certainly would not help support her, but would abandon him to his fate. Upon his return to California he wrote him to that effect.

As early as that time,—in the summer of 1874,—after having made these investigations and come to these conclusions, he told his son that "if he died and left him anything, he would leave it in trust to him; he would never leave it where his wife would get one dollar."

The facts above narrated, however, were not all

ARGUMENT

the facts upon which Parker based his opinion of the character of Edward's wife. The most conclusive evidence of the son's abasement and the wife's pernicious influence over him, as well as her own depravity, was yet to come. After his wife had been expelled from the Pomeroy mansion, Edward wrote to his father that his aunt Jane, who had been, as I have shown, a mother to him, had hired low-lived men to go to "his home and put filth upon his doorsteps, to insult him upon the street, as well as to go to his house to do it, and that she had reported that he was seen drunk in public on the street, and that they were both rotten with disease, and were living far beyond what they could afford to." This letter, though in Edward's handwriting, was the creation of his wife's malice. It was her plan of revenge upon her husband's benefactors. It was dictated by her. When Edward awoke from the spell which his wife had thrown over him, and under which he had been guilty of this ingratitude and baseness, he acknowledged with tears that the letter was false, begged pardon for writing it, and said, "Emma dictated the letter and made me write it." He humbly asked that the letter might be given back to him to be burned up. In his weakness, however, he sought to palliate his wife's wrong by saying that her motives were to protect herself, in a measure, and to make it appear to his father that the Pomerroys were to blame,—to discredit any statement that Jane and Noah, who were

CONTEST OF PARKER'S WILL

then about to go to California, might make about her and her husband.

I have now stated the facts within the testator's knowledge relating to the character of his son's wife. If, with this information, he reached the conclusion and formed the belief that she was a depraved woman and an adventuress, is it possible that any Court can justify the finding of a jury that that belief was an insane delusion—a figment of the imagination, springing spontaneously from a diseased mind, without evidence to justify it, without reason to support it?

Examine next the charge that the testator entertained an insane delusion that his son was a spendthrift and a drunkard, and was unworthy of his bounty.

The pernicious effect of the ill-fated marriage of Edward with Emma Huff did not stop with his moral degradation. Its result was not only to ruin the fair prospects which he had as the heir presumptive to the ample fortune of the Pomeroy's, but also to involve him in financial ruin.

The three months within which Edward's wife had promised to produce her marriage certificate elapsed; but, of course, she did not produce it. The falsehood, however, had given her time to fasten, or, rather, to tighten, the bonds by which she held her husband in servitude. The natural result followed. The very same year—1874—he asked his father for support, and begged him to

ARGUMENT

become the indorser of his paper. Two years after his marriage he was not only insolvent, but was threatened with arrest for obtaining goods under false pretenses. He was then owing from nine to ten thousand dollars. The kind-hearted and forgiving Jane came to his assistance with thirty-five hundred dollars, and the no less kind-hearted Noah stepped in and paid off all his debts, giving him for six years thereafter the benefit of his own large credit, standing behind him and practically assuming charge of his business, as he would have done for his own son. From that time on, he was a frequent applicant for, and the recipient of, assistance from Noah, from Jane, and from his own father. He died in 1894, twelve years after Noah took off his helping and sustaining hand. During that period his father had furnished him ten thousand dollars in addition to the ten thousand dollars capital with which he had originally started him. When he died he was insolvent. His estate paid only thirty-five cents on the dollar. His finances were at such an ebb that his father was compelled to furnish money for his nursing in his last sickness, and to save his credit, by paying off a note of one thousand dollars which he owed at the bank.

George H. Parker knew his son well. If he knew his good qualities, he also knew his weaknesses and his faults. He had kept up his intercourse with him, by constant visits and correspondence, up to the very day of his death. He knew the thraldom

CONTEST OF PARKER'S WILL

under which he was to his wife. He was acquainted with his habits and his lack of thrift. He labored under a deep conviction that his wife had been his ruin. He knew that she had been the means of cutting him off from his prospective inheritance from the Pomerroys.

If, in view of all he had done and all he knew, he believed his son to be a spendthrift, his conclusion, I respectfully submit, was both rational and sound.

A word now touching the subject of the testator's belief that his son was a drunkard. The foundation of that belief, if it existed at all, is given in the testimony of Mrs. Law. This witness was asked to state a conversation that took place, she said, between herself, the testator, and his sister Jane, at the Palace Hotel in 1888. The counsel on the other side said that their object was to prove that Jane instilled into the testator's mind the belief that his son was a drunkard. The witness then stated that Jane had said to her brother "that his son was all bloated up; that he was going to ruin; that he would n't know him,—and it was all on account of that woman." The testator, turning to the witness, had exclaimed, "My God, Ellen, see what my son is coming to!" It is claimed that from that time on he believed his son was addicted to drink. In the afternoon of October 7th, Mr. Rodgers, counsel for the contestant, stated: "George H. Parker believed these statements. He stated

ARGUMENT

to Mrs. Dougherty his information came from Jane."

Now, assuming all this to be true, how can it be claimed that the testator's belief, if he entertained it, was an insane delusion? The testimony shows the most brotherly and touching relations between the testator and his sister Jane. It is everywhere charged by the contestant, not only in her written grounds of contest, but here in open court, that he had implicit confidence in her, and that she exercised great influence over him. How, then, can it have been an insane delusion for this confiding brother to believe that what his sister told him was the truth,—especially so when her statement tended to reflect upon his son, and he recalled how tenderly she had loved him, had made, and was still making, her home his, cherishing him, even after his marriage, receiving him every week as a guest at her house? How can it have been an insane delusion for him to believe what she told him, when she was at the very fountainhead of information and he three thousand miles away?

As to the effect which the testator's knowledge of his son's conduct and character had upon the disposition of his bounty, there are certain facts which it is well to bear in mind. He was a New Englander of the old school. That he felt keenly the disgrace brought about by his son's marriage and conduct we know. But there is no proof that his tenderness for his son in any manner diminished.

CONTEST OF PARKER'S WILL

He looked upon his errors more in sorrow than in anger. He contemplated him with pity rather than indignation. He did not permit what he knew of him to smother his natural affection, nor hinder his desire to bequeath him all he had. It only made him solicitous so to dispose of his property that he might be safe and protected in its enjoyment. All this is made manifest by the testimony of the contestant's own witnesses, and is proved by his own conduct subsequent to the information he received from Jane.

From one of these witnesses we learn that at one time he appeared very much excited by letters received from his sister Jane. He was crying, and said that his only child was a disgrace to him. That his son was a drunkard and going to the dogs. He added that his son was a man any one ought to be proud to look upon, but his conduct was a disgrace, and he might as well have no child as to have a child like that. He did not, however, blame him. He thought it was his wife's influence. On a great many occasions he said that he loved his son, and the only thing he regretted was his marriage with an adventuress. He "said his son was his heir, and he ought to leave him his money, but he was afraid if he did that that woman he was married to would squander it and then turn him out of doors."

When he learned of his last sickness, he went East, as soon as his age and condition would permit, "to see his son and ascertain if he and his wife

ARGUMENT

were well cared for; he was going to take him and his wife to Cuba; he had money enough for them all." And, as stated by one of our adversary's witnesses, "while he was talking the tears came into his eyes." Though a very old man, he then crossed the continent to see him. He furnished him money to secure the best possible attendance. He took up his note of one thousand dollars at the bank. He left three hundred dollars with his clerk upon his departure. He attended to the payment of the premium on his life-insurance. He offered to pay the rent of his house. He went out riding with him every day during his visit at Cottage City.

The claim that he was lacking in affection toward his son is best refuted by the contestant's own testimony relating to the last interview he had with him. When informed that the son had policies of three thousand dollars on his life, the father said, "We will see that your policies are kept up." He then added, "What kind of a home have you got? I want you to keep that house up. Give him everything he wants. You'll be provided for. I want you to see that Ed has the best of care and everything he wants." In the very first conversation he had with his son's wife, upon his arrival, he had said to her, "I find my boy a very sick boy. I never expected to find him like this"; and then, at parting, he "threw his arms around him and kissed him."

In view of all this testimony, I ask, is it not

CONTEST OF PARKER'S WILL

preposterous to claim that George H. Parker's belief that his son was a drunkard was entertained without any evidence to support it—a creation of a diseased imagination? Upon this evidence are your Honors prepared to sanction the conclusion that the testator deemed his son unworthy of his bounty? In the face of these facts, are you ready to announce that when this frugal old New Englander, who had risen by his own unaided exertions from poverty to affluence, saw his son, in spite of the aid he had got from Noah and Jane, and from himself, within the verge of the criminal law, and ending in ultimate bankruptcy, it was an insane delusion—a mental condition having no evidence to justify it, the disordered offspring of a diseased imagination—to believe that that son was a spendthrift?

The third delusion charged against the testator is that he entertained an insane belief that his son's wife was supporting a man who was a counterfeiter, a gambler, and a *roué* with money stolen from her husband's store.

The whole of this charge is based upon the testimony of the contestant alone. She testifies that, in one of the interviews which the testator had with her in 1874 at the United States Hotel, he said, "I understand you are supporting a man who is a gambler and a *roué*, with money stolen from your husband's store," and that Edward then replied, "When you find anything of that kind, you can ask me to leave my wife." There the subject

ARGUMENT

dropped, never was again alluded to by the testator nor anybody else in his lifetime, and the contestant and her father-in-law went out that morning to take a ride together.

I submit that to set aside a will upon the ground that this single statement made by the testator, by way of inquiry and for the purpose of eliciting information, more than twenty years before he made his will, constituted an insane delusion which directly operated upon the testamentary disposition of his property would be a reproach upon the administration of justice.

It is said lastly that the testator entertained an insane prejudice against his son and his son's wife.

As to any prejudice against the son, I have already shown that the whole evidence refutes such a claim. It cannot upon this record be doubted that the father was deeply attached to his son,—none the less so for that he deplored the misfortune in which his marriage had involved him. As to the prejudice against the son's wife, I have already endeavored to show that the settled and deep-rooted aversion which Parker entertained toward her, far from being insane, was, under the circumstances, perfectly natural and rational, if not commendable.

Besides, men's wills are not to be set aside because of their likes or dislikes, their loves or hatreds, their rational inclinations or their violent prejudices. The law does not undertake the difficult task of

CONTEST OF PARKER'S WILL

tracing back to their source the feelings of the human heart. It is the privilege of every testator—a privilege without which the right to make a will would be valueless—to reward those he loves and to exclude from participation in his bounty those he hates. The law does not undertake to deal with purely moral obligations. It may be more commendable to love than to hate, but a testator has the legal right to entertain and act upon the one feeling as much as the other.

Says Mr. Justice McFarland, speaking for the Supreme Court of this State:—

“The likes and dislikes of human beings—their confidences and mistrusts—are often capricious and arbitrary; but they are not evidences of insanity because they cannot be logically defended to the satisfaction of those who think them wrong. In the case at bar there is no warrant for the claim that the testatrix's dislike . . . was an insane delusion; it was simply such a feeling, arising out of the recondite principles of attraction and repulsion, as is quite common among people of undoubted sanity.”*

Said the same Court, speaking through Mr. Justice Temple, in an earlier case:—

“It is quite common for people to be offended at imaginary injuries, to take offense when none was meant, to have a firm belief that they have been mistreated, not based on fact, and when the offending party would believe—for generally the baselessness

* *In re Spencer*, 96 Cal. 452.

ARGUMENT

of the belief could only be proved by them—that there was not even rational ground for such belief. . . . People may hate their relations for bad reasons, and yet not be deprived of testamentary power.” *

The claim that Parker was lacking in testamentary capacity on account of an insane prejudice against his son or his son’s wife is, I submit, absolutely without foundation.

Upon the whole case, I submit that a verdict finding the testator of unsound mind by reason of the alleged delusions mentioned, has manifestly no evidence to support it.

Having now said all I desire to say upon the subject of insane delusions, I next invite your Honors’ consideration of the other contention of the contestant,—general mental unsoundness.

In the first place, I call attention to the testimony given upon this subject on behalf of the respondents. We have produced twenty-five witnesses—and it must be apparent we could have produced a hundred more—who, in the most satisfactory manner, have testified to the testator’s mental soundness. These witnesses represent all classes of society. They come from all ranks, professions, and occupations. They are lawyers, physicians, capitalists, farmers, horticulturists, merchants, refined and accomplished women. Among them are his intimate acquaint-

* Estate of Carpenter, 94 Cal. 417-419.

CONTEST OF PARKER'S WILL

ances, friends, companions, and business associates of a lifetime. They give us a complete picture of his life for a period of over fifty years—from 1840 to his death, in 1893. With one accord they speak of him not only as a man of perfect mental health, but as one who to the last manifested exceptional business ability and intelligence.

In addition to this showing, there are not a few other considerations which bear upon the subject. In examining these, and, indeed, the whole of this part of the case, it is well ever to bear in mind that in the making of this will there was no fraud, no imposition, no undue influence. This is conclusively established by the action of the Court in withdrawing those issues from the jury, on the ground that there was no evidence whatever to support them. We have here, then, a testator acting in accordance with the spontaneous promptings of his own mind, carrying out in his own way the purposes which, without suggestion from any quarter, he had conceived. If we add to this the circumstances attending the making of the will, we shall have before us a group of facts which, according to all authorities, is entitled to the greatest weight in determining the question of the testator's mental soundness.

According to the books, and in consonance with common sense, if a person goes of his own accord to the office of a man of law of his own selection, and there, alone with his adviser, gives, without

ARGUMENT

assistance or prompting, intelligent directions for the making of his will, indicating the manner in which he desires his property to be bestowed, and naming the objects of his bounty, and if, in addition, the provisions of the will are in themselves rational, all these circumstances are among the most cogent that can be adduced as proof of his soundness of mind.

It appears from the testimony that, in 1888 or 1889,—I do not now recall which,—Parker had made a will as similar in every substantial respect with the one now in controversy as the circumstances then surrounding him—his wife being still alive—permitted. This will had been drawn by his attorney, Mr. Charles E. Wilson, of San Francisco. After his wife's death, the provision as to her needing alteration, and the testator being, besides, desirous of bestowing certain legacies upon relatives and friends, he went to the office of Mr. Patton, a prominent attorney in San José, and there, alone with Mr. Patton, gave the requisite directions for his new will. After the will had been drawn according to these instructions and executed, it was, upon further inspection by the testator, found deficient, in omitting legacies amounting to twenty-five thousand dollars to the children of Marshall Pomeroy. It was accordingly returned to Mr. Patton, the omission pointed out, and a new will—the one now before us—was drafted and signed. Subsequent to this, Parker, being desirous of adding one or more codicils, went

CONTEST OF PARKER'S WILL

to Mr. Patton's office, and procured the requisite legal formula for that purpose. He used it later in drafting with his own hand the two codicils which are now appended to his will. After doing so, he submitted the instrument with these codicils to Mr. Patton for revision or approbation. Nothing being found that needed alteration, the document is now as it was then shown him. The testimony of Mr. Patton upon these subjects is very full, explicit, and without contradiction.

Apart from the testimony of Mr. Patton, that in all this Parker acted in a manner denoting mental soundness, the circumstances themselves and the provisions of the will show, and the whole transaction evinces, conduct in every way rational and intelligent.

There are two other facts entitled to the greatest consideration. First, that for several years after it is claimed by contestant Parker was of unsound mind he kept a regular diary of his daily transactions, both of business and of social life; and, secondly, that during the year in which his will and codicils were drawn, and up to the time of his death, he was in frequent correspondence with his sister, Jane Pomeroy, and Mrs. Husbands, the lady who claims to have been engaged to marry him, for a year continuously before his death. It would be an idle consumption of time to read the details of these diaries and letters. It is sufficient for my present purpose to state, and the Court

ARGUMENT

will find that nothing in them can be discovered "sounding in folly." On the contrary, they are all emanations of an intelligent and strong mind.

Finally, I desire to call your Honors' attention to a fact, which, under the authorities, is quite conclusive upon this subject. There is no contradiction whatever that, up to the last, though Parker was over seventy-six when he died, he continued actively engaged in business and managed his affairs with prudence and sound judgment.

Such being the showing on behalf of respondents, and our opponents being charged with the heavy burden that rests upon those who rely upon insanity for their cause, what has the contestant brought forward to overthrow it and the natural presumption of soundness?

The only evidence upon which a motion to withdraw this issue from the jury could have been resisted, is that of three women,— Mrs. Dougherty, Mrs. Greenman, and Mrs. Smith. These are not new names. These women were all sworn upon the first trial, and, to the best of their ability, then supported the case of the contestant. Though her avowed champions then, brought here to prove the testator insane, they at that time had not been able to persuade themselves to testify that, in their opinion, he was of unsound mind. Not that the contestant did not on that trial attempt to offer the opinions of various persons as to the condition of his mind, for that attempt was repeatedly made. It

CONTEST OF PARKER'S WILL

failed because the witnesses could not show the requisite legal qualifications to entitle them to testify. But these three women, who now assert that they were Parker's intimate acquaintances, were not then asked, nor did they then even by accident state, that, in their opinion, he was of unsound mind. This silence, I repeat, can be accounted for only upon the assumption that at that time, however eager to lend support to contestant's case, they could not persuade themselves to maintain so monstrous a proposition. They have testified now, however, and their testimony being before us, it behooves us to proceed to examine it. *

The value of the opinion of these three witnesses is to be determined by the value of the reasons which they give for the faith that is in them. The Code of Civil Procedure allows lay witnesses to testify as to the mental capacity of others, on condition that they give the reasons upon which their opinions are based. "Evidence may be given," says section 1870, "of the opinion of an intimate acquaintance respecting the mental sanity of a person, the reason for the opinion being given."

It being, then, a rule of law as well as of common sense, that in investigations of this kind the opinion of no witness can rise higher than the reason given for it, if the reason given has no tendency to show insanity, the opinion must be rejected as

* Here Mr. Delmas went into a minute examination of the testimony.

ARGUMENT

valueless. For instance, if a witness should testify generally to his opinion that a certain person was of unsound mind, and give as his reason the fact that that person believed in the spiritual communication of the living with the dead, and did not believe in the Christian religion, his opinion would have no legal weight, since the entertaining of such belief or disbelief has no tendency to show insanity.

Said the Supreme Court of Michigan, in a case decided in 1893 :—

“ An opinion that a man is incompetent must be supported by some evidence that is inconsistent with competency. . . . An opinion that a testator was incompetent can only be given when the witness has testified to circumstances upon which it is predicated, and which to some extent justify it.”*

The same Court, in a subsequent case, said :—

“ Where the testimony of the witness only goes the length of showing acts which are entirely consistent with sanity, and which have not the slightest tendency to show insanity, it would be a dangerous rule which would permit his opinion to be received.”†

In conclusion, upon the general proposition that, where the reasons given by the witness as the basis of his opinion that a testator was of unsound mind are frivolous, or such as afford no rational warrant

* O'Connor vs. Madison, 57 N. W. Rep. 105, 107.

† Buys vs. Buys, 58 N. W. Rep. 331, 332.

CONTEST OF PARKER'S WILL

for reaching that conclusion, the opinion is worthless, and must be disregarded, I submit to your Honors the observation of the Court of Appeals of Maryland, which said:—

"It is contended by the learned counsel for the appellees that . . . if the medical expert gives the reasons upon which his opinion is founded, and they are such as men of ordinary knowledge can weigh, and are in the judgment of the court such as no rational inference can be deduced therefrom that the testator was wanting in the required mental capacity, his opinion does not afford evidence legally sufficient to show such want of capacity. As we understand this proposition of law, we are not prepared to dispute it. Merely because a witness is an expert does not require the court to be bound by his opinion if it is founded on such reasons as are clear absurdities. If, for example, a physician were to testify that, in his opinion, a testator was not of sound and disposing mind, capable of executing a valid deed or contract, and would in his further examination say that the only reason he had for such opinion was that the testator used patent medicines, or was a member of some religious or political faith other than his own, such opinion would be based on a foundation so clearly repugnant to right reason that a court would not hesitate to instruct the jury that it was not sufficient to support a verdict.*

Tested by this rule, it must be apparent that the opinion of these, the witnesses of the contestant

* Crockett vs. Davis, 31 Atl. Rep. 701, 712.

ARGUMENT

upon the issue of insanity, is valueless. The reasons they give have no tendency to show insanity.

The utmost that is claimed for them is that they show eccentricity. But this is not sufficient to prove unsoundness of mind. The unwise as well as the wise, the ignorant as well as the learned, the uncouth as well as the urbane, the eccentric as well as the perfectly balanced in mind, are all equally entitled to make a will. Says the Supreme Court of Delaware:—

“It does not take a wise man to make a will. A man must be possessed of sufficient memory to know what he has. He has a right, under the laws under which we live, to dispose of his property just as he pleases. It matters not whether he gives it to his own relatives or to somebody else. He may have eccentricities and peculiarities, but if those are accompanied at the same time with a sound judgment, discretion, and reason, he has a perfect right to do as he pleases with his property.” *

As to all the trifling peculiarities of conduct to which these three witnesses testify as a basis for their opinion, the best answer that can be given is found in the language of Chief Justice Cooley:—

“Now that it has become so common to assail, on allegations of mental disease, the wills of those who in life, in all their business and family relations, were treated as sane, it becomes of high importance that evidence should not be received as suggesting insan-

* Ethridge vs. Bennett's Ex'rs., 31 Atl. Rep. 813.

CONTEST OF PARKER'S WILL

ity unless it has some legitimate tendency to prove it. We are persuaded that much wrong has unwittingly been done in many cases by allowing misfortunes, family calamities and personal peculiarities to go the jury as having some necessary tendency to unsettle the mind, and therefore some bearing on the issue of mental unsoundness. As disturbing causes may be discovered in the family or personal history of almost every living person, the general result is that occasion is found for contesting the validity of almost every will, especially if the estate is sufficient to tempt the endeavor. Was the decedent afflicted with a loathsome disease? Then this presumably affected his mental health. Were his ambitious hopes disappointed? Then his reason must have given way. Did a brother have fits? Then there must have been insanity in some ancestor which has tainted the brain of all descendants. Has the only son gone to ruin? Then he must have inherited mental weakness from his father, and his bad conduct has probably reacted upon the father and disturbed his reason. Did the deceased have ways differing from most men, and rendering him eccentric? Then, surely, as most men are sane, he must have been insane. Has he failed to remember some nurse or some cousin in the distribution of his bounty? Then, behold, in ingratitude and want of family affection, the plain indication of mental disorder. But we need not pursue the list. Give free admission to such evidence, and no man can feel assured that the jury which examines his will in the light of his family

ARGUMENT

history and personal peculiarities, will not adjudge him a madman."*

But it is not alone the inherent weakness of the testimony of these three witnesses which condemns it and demonstrates the hollowness of the contestant's case. To this inherent weakness must be superadded the fact that a large number of other witnesses, far more intimately acquainted with the testator and infinitely better able to testify truly as to his mental condition, were not, though at hand, called by the contestant. Mr. and Mrs. Law, Mr. Sheldon, Mrs. Bickel, and Mrs. Husbands were all witnesses for the contestant. They were called and gave testimony in her behalf upon other points. They were the persons nearest and closest in intimacy to the testator. Their acquaintance with him ran back, in some instances, more than a quarter of a century. In all, it had continued unbroken up to the time of his death. Mr. and Mrs. Law had been his friends and neighbors since 1858. Speaking of them in his argument to the jury, Mr. Coogan called them "his oldest and best friends." Mr. Sheldon was his constant companion during the last eight or nine years of his life. They were accustomed to go out riding together almost daily, discussing the whole range of topics of ordinary personal and business conversation. Mrs. Bickel was, at the time he died, and had been for a long

* *Fraser vs. Jennison*, 42 Mich. 227-228.

CONTEST OF PARKER'S WILL

time before, his housekeeper, living alone with him in the same house. Mrs. Husbands claims to have been his *fiancée* during the year preceding his death,—at all events, a very close and dear friend, carrying on a constant correspondence with him.

Why were none of these persons thus eminently qualified asked whether, in their opinion, the testator was of unsound mind? Their silence and the failure of the shrewd and ingenious counsel for the contestant to interrogate them upon the subject is broadly significant. This silence, added to the inherent weakness of the testimony of the witnesses that were called, is sufficient to destroy the whole of this part of the contestant's case.

Where a party having at hand a witness possessed of full knowledge upon the subject under discussion purposely refrains from calling him, and contents himself with bringing forward a weaker one, the presumption is that if the former had been called his testimony would have been adverse.

Under the provisions of the Code of Civil Procedure, * the double presumption arises "that evidence willfully suppressed would be adverse if produced," and "higher evidence would be adverse, from inferior being produced." In conformity with this rule, the Supreme Court of New York said, in a case where a party failed to call in her

* Sec. 1963.

ARGUMENT

behalf one who the evidence showed must have been an eye-witness to the transaction:—

“There was also in this case a circumstance which was entitled to some weight against the plaintiff. That was the fact that the plaintiff had it apparently in her power to call a witness who, if her testimony was true, was, besides the parties, the only living eye-witness of the transaction upon which her cause of action depended, and she neglected to call him. . . . The omission to call that witness, or to account for not calling him, was, as the record stands, a potent circumstance against the theory of the plaintiff’s case.” *

The remarks of Lord Brougham in closing his argument in the House of Lords in defense of Queen Caroline have as full application to this case as to that:—

“Such, then, my lords, is this case. And, again, let me call on you, even at the risk of repetition, never to dismiss for a moment from your minds the two great points upon which I rest my attack upon the evidence; first, that the accusers have not proved the facts by the good witnesses who were within their reach, whom they had no shadow of pretext for not calling; and, secondly, that the witnesses whom they have ventured to call are, every one of them, irreparably damaged in their credit.”

As against the fantastic testimony of the three women called to support this branch of the con-

* Smith vs. Gunn, 12 N. Y. S. 808.

CONTEST OF PARKER'S WILL

testant's case,—weak in itself, and doubly weak by reason of the consideration just mentioned,—the respondents can safely rely upon the single fact that up to the last moment of life the testator continued in the active and intelligent management of a varied and extended business. This of itself is conclusive evidence that he was not wanting in the mental capacity required to make a will. In saying this I am not speaking of any possible delusion which might coexist with general business capacity. I have treated of the subject of delusions before. I am now addressing myself to the question of general mental incapacity springing from imbecility or dementia only.

Says Mr. Schouler in his Treatise on Wills:—

“ If a person has sufficient understanding and intelligence to transact his ordinary business, he is sufficiently capable of making a will; and to such a test testamentary capacity is often referred in dealing with witnesses *who testify to the point of mental unsoundness.* . . . It is a rule of law that a person who is capable of transacting ordinary business is also capable of making a valid will. It is not required that he should possess a higher capacity for that than for the transaction of the ordinary affairs of business. A man capable of buying and selling property, settling accounts, collecting and paying out money, or borrowing or loaning money, must usually be regarded as capable of making a valid disposition of his property by will.” *

* Sec. 67, note 1.

ARGUMENT

Says the Supreme Court of New Jersey:—

“Upon a careful review of the evidence in this case, I have no doubt of the testator’s capacity to make this will, or any other that seemed to him right. There was no evidence upon which a jury should be permitted to find against testamentary capacity. Such a verdict could not be sustained except by applying the maxim *voluntas stat pro ratione* to the jury instead of the testator. The testator transacted his own business long after the date of the will with the entire approbation of all his friends. No one appears then to have doubted his capacity, even when his conduct was disapproved of.” *

In the case at bar, we have before us a man who at the time of making this will was extensively engaged in buying and selling real property, making upon his own judgment large loans of money, planning and erecting houses, and, in general, managing with prudence and thrift an estate of over a quarter of a million dollars. No one testifies that in any business transaction he showed any weakness, or was ever taken advantage of or overreached. No one pretends to say that his purchases were extravagant or unprofitable. No one claims that his loans were not always made upon ample security.

Putting the matter to the test of the rule laid down by Schouler, I ask, if any of the various transactions in which the testator was engaged at the time he made this will, or up to the very day of

* Boylan vs. Meeker, 28 N. J. L. 278.

CONTEST OF PARKER'S WILL

his death, should now be attacked on the ground of lack of mental capacity on his part to understand or transact it, would any one have the audacity to say that the attack could be successfully maintained? Upon such evidence as has been submitted here, would a suitor have the front to seek in this tribunal to set aside a deed of property made by him during that period, upon the ground that he was of unsound mind? Upon the testimony of the three women I have named, would his executors ever dare to come into court to claim for his estate immunity from liability upon a contract entered into by him, on the ground that their evidence shows that he was at the time insane? Suppose that having determined to devote a part of his fortune to benevolent purposes, the testator had, on the day he made his will, given that part in money outright, instead of bestowing it by way of legacies,—suppose, for instance, that instead of bequeathing twenty-five thousand dollars to the five children of his brother-in-law, Marshall Pomeroy, he had then and there given them that amount in money,—could his legal representatives now recover back the money thus given, on the ground of lack of mental capacity on his part to make the gift? Suppose that at the same time, instead of making a legacy of five thousand dollars to the Sheltering Arms Society, he had given that amount outright to the kind-hearted ladies who manage that beneficent institution, would your Honors permit his legal

ARGUMENT

representatives to come here now to claim a return of the gift, on the ground that he was insane at the time it was made?

To ask these questions is to answer them. Yet if upon testimony such as this his contracts or gifts while living could not be set aside, still less can his will. It takes less mental capacity to make a will than to make a contract. If the courts would support his contracts made with the mental capacity shown in this case, it is their duty to support his will. In the language of Chief Justice Ryan: "It is as much the duty of courts to uphold his will after death as to uphold and enforce his contracts during life." * If, then, this, instead of being an attack upon his will, were an attack upon a contract executed by him on the same day that he executed his will, would not a charge of unsoundness of mind based upon such testimony as has been here adduced be laughed out of court?

And now, in conclusion, I respectfully submit that the ends of justice and the rules of positive law both require that the verdict be set aside.

It has been repeatedly said by our courts that the right to make a will to take effect after death stands upon the same footing as the right to make a gift during life; that the one is as valuable and as sacred as the other; that the title which beneficiaries have to their bequests is as valid as any other title to property; that the upsetting of wills

* Dodge vs. Williams, 50 N. W. 1104.

CONTEST OF PARKER'S WILL

is a growing evil; that it is the duty of courts not to permit the prejudice, caprice, or individual sense of justice of juries to set aside the wishes of the dead. These grave utterances of learned and eminent judges sound like a mockery if upon such testimony as I have rehearsed a testator can be adjudged insane and his will broken.

Thanking your Honors for the patience, courtesy, and kindness vouchsafed me during this argument, I now submit into your hands this motion for new trial.

TO THE STATE SUPREME COURT

THE following argument was made in the Supreme Court of California sitting in banc, on the 8th day of March, 1893. The question presented for discussion was whether a court has the power to make and enforce an order forbidding the publication of the proceedings of a trial pending before it. Mr. Delmas contended that it had not ; and in this view was sustained by the Court.

The facts out of which the controversy arose are stated in the opinion of the Court delivered by Mr. Justice Paterson, as follows:—

“ When the case of Price vs. Price—an action for divorce—was called for trial in the Superior Court of Santa Clara County, the court was advised that the evidence would probably be of a filthy nature, and thereupon made an order directing ‘that during the trial all persons be excluded from the court-room except the officers of the court, the parties, and their counsel.’ It was further ordered ‘that no public report or publication of any character of the testimony in the case be made.’ On the following day the petitioner herein caused to be published in the *San José Mercury*, a newspaper of which he was the editor and publisher, an article referring to the order of the court and containing what purported to be the testimony of the witnesses. Upon an affidavit setting forth the facts stated, the court made an order commanding Shortridge to appear and show cause why he should not be adjudged guilty of contempt. Mr. Shortridge in his answer and at the hearing disclaimed any intention to reflect upon the court, or show any disrespect therefor, and claimed that in publishing a fair and true report of the testimony and proceedings he was simply exercising a constitutional right with which the court could not interfere by order or otherwise. Thereafter an opinion was filed showing that the learned judges of the court, sensible of the delicate position they occupied in determining the scope of their own judicial powers, had given the subject most careful consideration, and holding it to be their duty in support of the honor of the State and the dignity of the court to punish the respondent for violating the order. A judgment was entered adjudging Shortridge guilty of contempt of court, and ordering him to pay a fine of one hundred dollars. Thereupon the petitioner herein applied for a writ of certiorari, which was granted, and the matter having been heard and submitted, we are now called upon to determine whether the court exceeded its jurisdiction in adjudging the petitioner guilty of contempt on the facts stated.” *

* 99 Cal. Rep., p. 528.

IN RE SHORTRIDGE

MAY IT PLEASE YOUR HONORS: This proceeding was instituted to review a judgment punishing the petitioner for contempt, charged to have been committed in publishing the testimony given on the trial of a case, in disregard of an order forbidding such publication.

The facts lie within a narrow compass, and may be briefly stated as follows: On the 10th day of January of the present year, when the divorce case of Price vs. Price was called for trial, the Superior Court of the County of Santa Clara ordered that the hearing be had in private, and that no publication or other report of the testimony be made. The following morning, the petitioner, though aware of the order, published in a newspaper of which he was the editor a fair and truthful statement of the evidence given on the preceding day. Being advised of this fact, the court cited him to show cause why he should not be punished for his disobedience. He appeared, and maintained that it was his right to publish the proceedings; that that right was not impaired by the fact that the trial was

ARGUMENT

had behind closed doors, nor affected by the order forbidding the publication. The court, not acceding to these views, adjudged him guilty of contempt.

In the elaborate opinion rendered by the court, this course is vindicated on the ground that it was warranted by that provision of the Code of Civil Procedure which authorizes it to punish as a contempt any disobedience of its lawful orders. It said :—

“In this matter, the court relies for its authority upon section 1209 of the Code of Civil Procedure, on Contempts, which says: ‘That any disobedience to a lawful order of court shall be contempt.’ The court is not asserting that there has been any unlawful interference with its process or proceedings, but that there has been a disobedience to a lawful order which it had authority to make.”

The court held that section 125 was enacted for the purpose of securing absolute secrecy of the proceedings in divorce cases ordered tried in private, and that, by necessary implication, it conferred the power of preventing their publication out of court. In its opinion it said :—

“The evident purpose of that act was, that in cases of divorce, criminal conversation, seduction, and breach of promise of marriage—those being alone enumerated in the statute—the entire evidence should not be produced before the public.”

The court considered that section to have been enacted in furtherance of morality, and to have for

IN RE SHORTRIDGE

its object the protection of the public mind from contamination by the prurient revelations often incident to actions of divorce, criminal conversation, seduction, and breach of promise of marriage. Said the court in its opinion :—

“ The main purpose of this enactment was to promote public morals. How the public morals can be promoted by detailing to the world the testimony in low and filthy divorce cases, or blazoning forth the injuries that some poor, unfortunate girl may have suffered, or by heralding the connection of good and respectable and moral people with divorce proceedings, where they are unfortunately and unwillingly as witnesses, is something which the court cannot understand, and which the Legislature unquestionably intended to prohibit.”

The position of the court, and of the learned and eminent counsel who represent it, however stated, ultimately amounts to this: that the publication in question was an interference with the proceedings of the court, which the court had the inherent power to punish as a contempt; that it constituted a disobedience of a lawful order of the court prohibiting it; and that it was a violation of the secrecy of the proceedings of the court enjoined by the statute law of the State.

The petitioner challenges the correctness of these positions. His contentions may be stated as follows :—

First—The liberty of speech and of the press is

ARGUMENT

his by natural right, consecrated and made inviolable by the Constitution of the State. The only limitation placed upon that liberty is the condition that it shall not be exercised to the injury of others. As regards a court of justice, the lawful limits of that liberty are not transgressed until its exercise is made to interfere with the due and proper performance of the duties with which the court is charged. Before the court can complain, this interference must be proven. It being conceded that the publication in this case was a true and correct report of the testimony given in the cause on trial, such publication cannot have interfered with the due and proper performance of the duties of the court in that case, and cannot therefore constitute an unlawful use of that liberty.

Secondly—The order prohibiting the publication is a false quantity in the case. The power of a court to control action by command or prohibition is restricted to the persons before it. It cannot determine the conduct of those over whom it has acquired no jurisdiction. The petitioner not being a party to the action on trial, the order forbidding the publication of the proceedings cannot operate to affect his rights or abridge his liberty. If what he did is not by law made unlawful, it cannot be made so by the order of a court which had no jurisdiction over him. If, then, the publication made by the petitioner would not have been unlawful in the absence of an order prohibit-

ing it, it was not rendered unlawful by such an order.

Let it be noted here that there was nothing in the publication in question which could shock public morality. But were it otherwise it would not affect the question. The duties and functions of a court are limited to the adjudication of controversies of which it has acquired jurisdiction. It is not constituted the champion or defender of morality at large. The author of an obscene publication may be guilty of an offense triable by indictment if he therein violates the law of the land. He does not become guilty of an offense triable as a contempt from the mere fact that he therein disobeys the order of a court which has no jurisdiction over him.

Thirdly—It is the right of the public to know the proceedings of courts. Judges are but the servants of the people, appointed to dispense that justice of which the people, as sovereigns, are the source. The people, therefore, have a right to be informed of the manner in which these, its servants, are performing the task assigned them. The proceedings of courts are, therefore, public property. Any legislative enactment that the public shall be debarred from a knowledge of their proceedings would be void. If, then, section 125 of the Code of Civil Procedure was intended to shut out the public from information of the proceedings in the cases which it enumerates, the provision is uncon-

ARGUMENT

stitutional. But that section has no such scope or purpose. It aims simply at the regulation of proceedings in court, and not their divulgment or discussion out of court.

Before entering upon a vindication of the positions thus assumed by the petitioner, I desire to eliminate from the discussion a matter which was attempted to be imported into it in the court below, and which may again be insisted on here.

The petitioner was neither charged with nor tried for a contempt consisting of an interference with the conduct of the trial, or with the witnesses or testimony to be produced before the court. There was no allegation of such interference in the affidavit. That document, after setting forth the order of the court directing that the trial be had in private, and that no public or other report or publication of any character of the testimony be made, simply states that the trial was accordingly had with closed doors, and that the testimony of various witnesses was therein given. It then avers that Charles M. Shortridge, being the editor and publisher of the *San Jose' Daily Mercury*, "willfully and unlawfully and contumaciously disregarding the order of said court, made and entered as above recited, caused to be printed and published in said *San Jose' Daily Mercury* what purported to be the testimony of said witnesses, . . . and did publish to a considerable extent the testimony as given in fact by said witnesses." The citation issued upon that

IN RE SHORTRIDGE

affidavit required Mr. Shortridge to appear and show cause why he "should not be punished for contempt of court, in publishing in the *San José Daily Mercury* of the issue of January 11, 1893, the testimony of certain witnesses given in the above case, contrary to the order of the judge of Department 1 of the Superior Court, duly made and entered on January 10, 1893, prohibiting it."

Of course, the trial of Mr. Shortridge for contempt could not be broader than the charge thus made. The law provides that "when the contempt is not committed in the immediate view and presence of the court or judge at chambers, an affidavit shall be presented to the court or judge of the facts constituting the contempt." * The party may then be cited to answer. † When he appears, "the court or judge must proceed to investigate the charge, and must hear any answer which the person arrested may make to the same," ‡ and "upon the answer and evidence taken, the court or judge must determine whether the person proceeded against is guilty of the contempt charged." § The affidavit stands in the place of an indictment. The power and jurisdiction of the court are to inquire into the charge made in the affidavit. The trial cannot be broader than the charge. This is not only manifest from the language of the statute and the general principles of law applicable to criminal proceedings, but

* C. C. P., sec. 1211.

† Id., sec. 1217.

‡ Id., sec. 1212.

§ Id., sec. 1218.

ARGUMENT

is the direct result of the doctrine laid down by the Court in *Batchelder vs. Moore*. *

Had the court made an order excluding the witnesses from the court-room, and had the petitioner, by publication pending the trial, communicated the testimony to the excluded witnesses, thereby imparting information which the court, in the exercise of its legitimate powers, had, in effect, ordered withheld from them, and had these facts been regularly brought to the attention of the court by an affidavit under section 1211, he might then possibly have been tried for an improper interference with the proceedings of the court. There is here, I repeat, no such charge. Nor has the petitioner been tried for any such interference. It is not stated that the witnesses were excluded from the court-room, nor that, if they were, they ever saw or heard of the publication made by the petitioner. The court, in its opinion, expressly removed the case from that ground, saying:—

“When the court orders the exclusion of witnesses pending the trial, so that there cannot be communicated to witnesses outside the evidence which is being given by the witnesses on the stand, I am fully satisfied—and the authorities sustain me—that it does not lie with the newspapers to make an entire publication of that testimony, so that what the court prohibited them to learn may be given to witnesses on the outside. If it is done, that is an interference

* 42 Cal. 412.

IN RE SHORTRIDGE

with the proceedings of the court, and is punishable as a contempt. I am not, however, basing the action of this court upon that code provision, and the matter is not narrowed down into that channel, and cannot be drifted there by the position of counsel."

The whole question in the case really is whether the facts stated in the affidavit presented to the court show the commission of an act constituting a contempt. If they do not, the petitioner could not be punished for one; for, as was said by this Court in Batchelder vs. Moore, "if there be no affidavit presented, there is nothing to set the power of the court in motion; and if the affidavit, as presented, be one which, upon its face, fails to state the substantive facts which in point of law did or might constitute the contempt on the part of the accused, the same result must follow,—for there is no distinction in such a case between the utter absence of an affidavit and the presentation of one which is defective in substance in stating the facts constituting the alleged contempt."

The question, broadly stated, then, is briefly this: When in this State a Superior Court is trying a divorce case in private, and has made an order that no public or other report or publication of any character of the testimony be made, does the mere fact that a person, in conscious disregard of the order, publishes the testimony given upon the trial constitute a contempt?

The petitioner claims, in the first place, that the

ARGUMENT

publication did not and could not interfere with the proceedings of the court, and was, therefore, within the limits of his constitutional rights.

That the freedom of the press is one of the most valuable and important of the liberties enjoyed by a free people, one which it is the duty of all concerned in the administration of public affairs to protect, and the right of every citizen to defend and maintain inviolate, is a truth too obvious to need elaboration. It is a topic upon which judges and statesmen have lavished their combined encomiums. Though the mind is prone to swell with the magnitude of the subject, yet when I say that the liberty of speech is one of the invaluable rights, one of the great bulwarks of liberty, essential to the freedom and security of the State, to be held sacred and forever inviolate, I do not echo the tropes with which poets and orators have adorned an inspiring theme, but repeat the words which the sober and thoughtful founders of States from the days of the Revolution to the present time have incorporated in every American constitution. When I say that the freedom of the press is a principal pillar of a free government, and that when this support is taken away the constitution of a free society is dissolved and tyranny is erected on its ruins, I reutter the very words of one who among the Fathers of our Government was perhaps the least inclined to hyperbole.

This liberty, however priceless, cannot nevertheless be said to be boundless and absolute.

Nothing can be so in a society ruled by organized government. The right of life—the foundation of all others—is itself held under certain unavoidable limitations. What, then, are the bounds within which the liberty of the press must be enjoyed, and beyond which it cannot extend? In ages past governments undertook to regulate and limit it by compelling the submission of all intended publications to their inspection, and suppressing those which did not receive their sanction. The same era which brought forth the invention of printing also gave birth to the licenser of the press. The earliest formed of the American commonwealths were the first to break the fetters of a licensed press, and to proclaim liberty of speech as one of the fundamental rights of freemen.

What are, then, the constitutional limitations imposed upon the enjoyment of this right? None other, I say, than those which are imposed upon the enjoyment of all other rights; that is, that it must not be exercised to the injury of others. Anything short of this is permissible. The maxim, *sic utere tuo ut alienum non laedas*, which formulates the only limitation upon the use of property, also formulates the only limitation upon the enjoyment of personal liberty. The acquisition of property is a fundamental right, but it must be exercised without injury to others. It does not sanction robbery or theft. Freedom of action is similarly limited. It does not justify assaults upon the person or destruc-

ARGUMENT

tion of the property of others. It gives no immunity to arson, rape, or murder. And so the liberty of the press stops at the point where a further exercise would invade the rights of others. It does not warrant libel or violations of public decency or morality. All within these limits, however, is legitimate. I venture to lay it down as an axiom, that in a court of justice no one can complain of the use which another has made of his liberty, unless he can show that that use is an invasion of some right which is his. Failing that, the proper bounds of that liberty have not, as to him, been transgressed.

The case before your Honors is one where a court of justice claims that, as to it, a citizen has abused the liberty of a free press. What must the court show in order to substantiate that claim? Upon the principles already announced, it must show that that liberty has been used so as to interfere with the rights of the court. The court, complaining of an individual, is bound, like any other person or body, first, to show interference with its rights. If there is no such interference, there is, so far as the court is concerned, nothing legally reprehensible.

Apply these principles to the matter in hand. When the divorce case of Price vs. Price was called for trial, the Superior Court of Santa Clara County became at once charged with the performance of certain duties. Those duties were to hear the testimony of the parties, and decide the controversy

IN RE SHORTRIDGE

according to the evidence and the law. Any act which interfered with the proper performance of these duties would constitute an invasion of the rights of the court, and consequently an abuse of the actor's liberty of action. For instance, and merely by way of illustration, if during the session of the court an individual had conducted himself in a noisy and boisterous manner, so as to interfere with the hearing of the testimony or arguments, or if he had prevented witnesses from attending court, this would have constituted an invasion of the province of the court and a transgression of the proper bounds of his liberty. But if the complaint were leveled against an act which did not so transgress, it would have no foundation in law.

What, now, is the act complained of by the court in this case? This: that while a certain cause was being tried by the court, sitting without a jury, Mr. Shortridge published a truthful report of the testimony. Was this use by Mr. Shortridge of the liberty of the press a use which could afford just ground of complaint? In other words, was the publication an act which interfered with the due and proper performance by the court of the duties with which it was charged in the trial of that case? If there was no such interference, there was no abuse of the liberty, and the court cannot be heard to complain.

That there was no such interference is manifest. Mr. Shortridge merely published testimony already

ARGUMENT

given. He but echoed a voice which the court had already heard. How could this be an interference with the performance of the duties and functions of the court, which were to hear the testimony and decide the case according to the evidence and the law? How can the truthful publication of the proceedings of the trial produce or have the tendency to produce such a result? Does it interfere with the judge's reception or consideration of the evidence that he reads in a newspaper a report of testimony which he has already heard from the witnesses' lips, and which, in all probability, before deciding the cause, he will again read from his own notes or in the reporter's transcript? It is impossible to imagine that it does. Can the publication of a truthful report of proceedings interfere with the proper decision of a cause? It is not conceivable that it can.

But it is claimed that the publication of the proceedings might have interfered with the testimony in the case. How? Because, it is answered, witnesses might well make disclosures, under the assurance that their utterances would remain secret, which they might be tempted to withhold if oppressed with the fear of publicity.

In the first place, the argument proves too much. If it is sound, it would result in the prohibition of the publication of testimony in all cases. If it be assumed that a witness may for these reasons withhold testimony in a private action for seduction,



divorce, or criminal conversation, he might for the same reason withhold it in a criminal prosecution for rape or adultery. Will it, then, be held at this date that on this ground it is an interference with the proceedings, and therefore a contempt of court, to publish the testimony given upon a public trial for these offenses?

In the next place, if the contempt charged consists in interfering with the proceedings of the court, the facts showing such interference must be alleged. It cannot be sufficient to aver generally that the accused has interfered with the proceedings, or that he has done something which might possibly have had that effect. The act done must be stated, and it must further be shown how it did in point of fact interfere. Proceedings for contempt are criminal in their nature. All intendments are in favor of the accused. All the facts essential to show the commission of the offense must be categorically set forth. If, then, the contempt is charged to consist in interference with the proceedings of the court in a given case, in that the accused prevented a witness from testifying, or knowingly attempted to do so, the facts constituting such prevention or attempt must be definitely alleged. There is no averment here that any witness did, on account of any act of the accused, fail to testify, nor that after the publication in question there were any witnesses to be called into court who might, on account of the publication, have been prevented from testi-

ARGUMENT

fying. From the mere fact of the publication of the testimony it will surely not be inferred, either as matter of law or fact, that witnesses were actually so prevented. If the publication were made after the close of the testimony, or if it were made pending the giving of the testimony, in a remote county, in a print which the witnesses never saw, it surely could not be held to have prevented, nor to have had a tendency to prevent, any witness from testifying. The bare fact stated here is, that the testimony was published—nothing more. This, I repeat, does not amount to an allegation that there was an interference with the proceedings, in preventing or attempting to prevent any witness from testifying.

But, lastly, this whole argument proceeds upon the assumption that witnesses will not tell the truth if they know that their testimony is to be made public. What warrant is there for this assumption? A witness is sworn to tell the truth and the whole truth. A violation of his oath is a crime. What right have you to assume that he will incur the penalties of a felony because he knows that the truth which he is called upon to tell will be repeated out of court? No more, I submit, than you have to assume that a juror will not render a true verdict, or a judge will not proceed to judgment according to law, because he knows that the verdict or decision will appear in the next morning's papers.

It has also been urged that the publication of proceedings in this class of cases will have a ten-

dency to prevent parties from instituting them,—that, for instance, an injured wife might seek redress for the misconduct of her husband if assured of secrecy, who would shrink from doing so if the proceedings in her action for divorce were to be made public.

But is not this assumption fanciful? Is there any real danger that any innocent woman will abstain from seeking redress for fear of exposing the misdeeds of the husband who has wronged her? If innocent, what has she to fear from publicity? Will not secrecy, on the other hand, expose her to the misrepresentations which slander is sure to disseminate in obscurity, and which the light of truth would dispel? Indeed, the effect of the statute, if thus construed, would seem to be rather to shield the guilty than to protect the innocent.

But let us bear in mind that the argument I am now dealing with is one put forward to show that the publication in question interfered, or had a tendency to interfere, with the proceedings in the case then on trial—not with cases that might thereafter be brought. Because the publication he made may have a tendency to deter the bringing of future actions of divorce, Mr. Shortridge could surely not be held, on that account, to have interfered with the proceedings in the action then on trial. That publication had certainly not interfered with the institution of that action. To the argument, therefore, that what Mr. Shortridge did was an inter-

ARGUMENT

ference with the proceedings of the trial of the action then pending in this, that such publication has a tendency to deter parties from instituting such actions, the simple answer is, that it caused no such interference in that case, for the action had been brought before the publication. That such publication may deter parties from bringing actions for divorce in the future is a matter which could not constitute an interference with the proceedings in that case; and that is all that the accused could possibly be charged with here.

In what way, then, has the petitioner transgressed the proper limits of his constitutional liberty? What rights guaranteed to others has he invaded? Whose freedom of action coexistent and coequal with his own has he abridged? Whom has he injured? The answer is, No one. He stands here before a court of justice, charged with an offense, called upon to answer for a crime. If he has interfered with no one, who shall complain? If he has injured no one, who shall demand redress? If he has done no wrong, by what law shall he be punished?

It is submitted that, in making the publication in question, the petitioner exercised his constitutional right within proper limits; that the publication was not of a nature to interfere with the duties and functions of the court; that there is no charge that he interfered with the conduct of the trial or the proceedings of the court, and that, therefore, he

cannot, by virtue of any inherent power in the court, be subjected either to punishment or censure.

But it is urged that the court made an order prohibiting the publication of its proceedings; that the publication made by the petitioner was in conscious disregard of that order, and is therefore unlawful and a contempt.

With great respect for the learned judges of the court below, who laid much stress upon it, it is submitted that the order is a false quantity in the case. The petitioner was not a party to the action of Price vs. Price. He was not before the court. The court had acquired no jurisdiction over his person. No order, then, which the court could make in that case could affect his rights or operate as a regulation of his conduct. Judicial power is the power to hear and determine the controversies, redress the wrongs, or enforce the rights of parties regularly brought within its jurisdiction. Beyond this, the functions of a judicial tribunal do not extend. It has no power of command or prohibition over the community at large. It may by its decrees control the actions of the parties before it, and prescribe rules for their conduct, to disregard which would in them be unlawful. But it cannot adjudicate beforehand that parties not before it shall have no right to pursue any given line of action.

When the Superior Court of Santa Clara County by its order prohibited the whole community, and inclu-

ARGUMENT

sively the petitioner, from making any public or other report or publication of any character of the testimony in the cause then pending before it, it adjudged, by necessary implication, that the community, the petitioner included, had no legal right to make such report or publication. But the court, having no jurisdiction over the community at large, or over the petitioner, had no power to determine or adjudge what their rights were or were not. To prescribe rules of conduct for a community is the function of a legislator, not a judge. To furnish a standard by which the legality or illegality of the actions of the people of a State at large shall be determined is to promulgate a law, and not a judicial decree.

Undoubtedly, disobedience of a lawful order of a court constitutes an offense. It is so expressly declared by subdivision 5 of section 1209 of the Code of Civil Procedure, which says that disobedience to any lawful judgment, order, or process of the court is a contempt of the authority of the court. But it is obvious that this disobedience must be by one whom the court had a right to command, over whom it had acquired jurisdiction. Any attempt of the court to command others is vain. As to them the order is a nullity.

The justification of the order made in this case is stated in the proposition that the court had a right, by forbidding their publication, to protect the public from the moral contamination of the disclosures

which attend the trial of actions of divorce, criminal conversation, seduction, or breach of promise of marriage.

A short answer to this proposition lies in the fact that the publication made here by Mr. Shortridge was neither in form nor substance of a nature to offend the most delicate sensibility. This justification of the position of the court being based upon the assumption that the publication will be against public morals, if in point of fact it is not so, the public are in no danger,—they need no protection,—and the justification vanishes.

But I prefer to place the reply upon a broader footing. That the court has, upon the grounds claimed here, no power to make such an order is a proposition which results from the inherent limitations imposed upon judicial authority. As I have already remarked, a court is created to interpret and apply the law in controversies pending before it. Its functions are limited to the redress of the wrongs or the enforcement of the rights of parties legally brought to its bar. Beyond this they do not extend. If it takes cognizance of the claims of public morality, it does so no further than is necessary to do justice in the cause on trial. In an action between private individuals it has no power to make rules for the benefit of the State at large. It has no more warrant to deal generally with questions of public morals than it has with the regulations of public finance. The community at large are not before it.

ARGUMENT

It has no jurisdiction over their concerns. To make regulations for the benefit of the public is not the function of a judge. Such regulations are laws, not judgments.

Whence does the court derive the extraordinary power set up here? When, I ask, have the people constituted their judges the guardians of morality at large? When have they appointed them censors, clothed with power to determine, *a priori*, what literature is wholesome and what noxious to the community? When have they surrendered into their hands the custody of the liberty of speech or of the press, vouchsafed in England only after a struggle of centuries against arbitrary rulers, and erected here from the first dawn of government as the main pillar of the temple of American commonwealths,—when, I say, have the people surrendered that liberty into the hands of judges, and given them the right to decide beforehand that there are subjects which the people may not read of, and may not even discuss?

The claim made by the court below is of the most extraordinary and startling character. It assumes not only to paralyze the pen and stop the press, but also to seal the lips and stifle the utterances of the community. Its order, as given in the affidavit, is that “no public or other report or publication of any character of the testimony in said cause be made.” Under this order no man may repeat the evidence, either in private or in

public. He may not only not disseminate it in print,—he must not even confide it to the sanctity of a private correspondence or whisper it in the most confidential conversation. But this is not all. No limits are set for the duration of this order. It is to continue in force for all time. The secrecy imposed is eternal. The silence enjoined is the silence of the tomb. An unfortunate wife who, falling a victim to the perjury of suborned witnesses or a corrupted jury,—such things have happened,—has been unjustly found guilty of infidelity may not appeal for a reversal to the tribunal of public opinion. She may not outside of court raise her voice or wield her pen in her own defense. She may not only not interpose against the weight of infamy which crushes her in the mire the disclosure of the villainy of which she is the victim, but even in the presence of mother, sister, or friend, her heart must burst under the burden of the repressed vindication which struggles in vain for utterance. She must walk the rest of life's journey and go down to the grave in silence.

Is an order fraught with such fearful consequences the order of a judge made in this, the second century of American Independence, or is it the decree of an inquisitor, formulated in days when the victims of fanaticism were burnt at the stake, and their writings thrown into the flames by the executioner?

It is unnecessary to pursue the subject further. It

ARGUMENT

must be apparent that, under the plea of protection of public morals, the Superior Court of Santa Clara County had no more right to prevent the public from reading the testimony in the case of Price vs. Price than it had to forbid their perusing the memoirs of Casanova or the tales of the Decameron.

Whether, therefore, the petitioner acted illegally in making the publication in question is determinable by the law, and not by the order of the court. If the law, under the circumstances stated, prohibited the publication, the order of the court was superfluous, and the petitioner is censurable regardless of that order, for the all-sufficient reason that he has violated the law. If, on the other hand, the law did not, under the circumstances, prohibit the publication, the petitioner had the right, under the law, to make it, and that right could not be abridged or taken away by an order made, without giving him a hearing, by a court which had no jurisdiction over him. It would be a violation of the plainest and most fundamental principles of our form of government, and would constitute a most intolerable despotism, to have it established that the conduct of the community may be regulated by the *ex parte* orders of a court, or that persons must guide their course of life not by the rules which the law of the land lays down, but by such orders as the judiciary may in secret make. The disobedience of such orders is no offense. Nay, it is deserving

IN RE SHORTRIDGE

of the highest commendation. Resistance to illegal usurpation of authority is none the less the right and the duty of a citizen because the usurpation is made by the judiciary,—else were the dearest rights which organized governments are instituted to protect held at the mercy of the whim or caprice of every accidental incumbent of the bench.

If the first proposition which I have sought to establish is true,—that the publication in question did not and could not interfere with the proper discharge by the court of the powers and duties conferred upon it; that there is no charge that it interfered with the proceedings of the trial, and that it was, therefore, within the proper limits of the liberty of the press,—Mr. Shortridge had a constitutional right to make that publication, and that right was not lost to him by reason of the order forbidding its exercise.

It is claimed, in fine, that the case of Price vs. Price was an action for divorce ; that the law authorizes the court to order such an action to be tried in private, excluding from the court-room all persons except the parties, their counsel, and their witnesses ; that in this case the court made such an order, and the trial proceeded with closed doors. It is insisted that these facts amounted in law to an injunction of perpetual secrecy, and consequently operated as a prohibition of the publication of the proceedings of the trial,—in other words, that, under these circumstances, the law itself prohibited the publication.

ARGUMENT

This claim is made under section 125 of the Code of Civil Procedure. The section is in these words :—

“ In an action for divorce, criminal conversation, seduction, or breach of promise of marriage, the court may direct the trial of any issue of fact joined therein to be private, and may exclude all persons except the officers of the court, the parties, their witnesses and counsel; provided, that in any cause the court may, in the exercise of a sound discretion, during the examination of a witness, exclude any or all other witnesses in the cause.”

Was this section intended to enjoin absolute secrecy, and to exclude the public from all knowledge of the proceedings of a trial had with closed doors? and if it was, is it in that regard constitutional? These questions deserve consideration.

That in a free country the administration of justice is a matter of public concern, and that the people have a deep interest in the conduct, actions, and decisions of their judges, and a right to be informed and know what is done in their courts, are propositions not open to doubt. Were judicial precedents needed in their support, no long search would be necessary to find them. Under the law, the publication of a truthful report of judicial proceedings is privileged; and however severely and unjustly the publication may reflect upon private individuals, it is no libel. Why is this so? Why must the private injury remain under these circumstances unredressed? The answer is given in the

language of the judges of England, who had established the doctrine upon common-law principles long before we copied and incorporated it into our statute-book. In 1799, in the case of *Rex vs. Wright, Lawrence, J.*, said :—

“ Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public more than counterbalances the inconvenience to the private persons whose conduct may be impugned.”*

In *Davison vs. Duncan*, decided by the Queen’s Bench in 1857, Lord Campbell, Chief Justice of England, said :—

“ A fair account of what takes place in a court of justice is privileged. The reason is that the balance of public benefit from publicity is great. It is of great consequence that the public should know what takes place in court. . . . The inconvenience, therefore, arising from the chances of the injury to private character is infinitesimally small as compared to the convenience of publicity.”†

And in 1868, another Chief Justice of England, Lord Cockburn, in *Wason vs. Walter*, said :—

“ The advantage to the community from publicity being given to the proceedings of courts of justice is so great that the occasional inconvenience to indi-

* 8 T. R. † 7 E. & B.

ARGUMENT

viduals arising from it must yield to the general good.” *

This is the language of grave and learned judges, giving voice to a fundamental principle of the common law of England. But why, it may be asked, is it of vast importance to the public that the proceedings of courts of justice should be universally known? I answer again, in the language of another distinguished judge, the Chief Baron of the Court of Exchequer, in the case of Gathercole vs. Meall,† because the “conduct of judges and proceedings of all persons who are responsible to the public at large are deemed to be public property,” and in that of Lord Cockburn, in the case already cited, because “the nation profits by public opinion being thus freely brought to bear on the discharge of public duties.”

If these doctrines are recognized in England, how much more true are they in commonwealths where all power, judicial as well as executive or legislative, is derived directly from the people! If the conduct of English judges appointed by the crown is confessedly public property, and the discharge of their functions is a matter upon which it is of profit to the nation that public opinion should be freely brought to bear, how much more are these truths applicable to the judges of an American State, who are elected for limited terms by the people! In

* L. R., 4 Q. B.

† 15 M. & W.

England the monarch is the fountain of justice ; the judges are his ministers, appointed to assist him in the discharge of his duty to dispense justice among his subjects. In our commonwealths the administration of justice is the sovereign right of the people. The power of courts is held by direct delegation of the people. The judges are but the servants of the sovereign, invested with power to deal out justice according to the people's behests, expressed in their constitutions and laws,—to dispense the people's justice according to the people's commands. That the people should be excluded from all knowledge of the manner in which their judges discharge the functions with which they are clothed, presents the anomaly of excluding the master from knowledge of the manner in which the servant does the master's work.

In the early days of the English monarchy, the king himself sat in his own hall, and, in proper person, exercised his royal prerogative of dispensing justice. As the law became a complex science, demanding special study for its understanding and application, the exercise of this royal prerogative was in practice abandoned, and the administration of justice was left entirely to the judges. Still was the king, in the eye of the law, always present in his own court, and the writs issued from the King's Bench were returnable before the king himself. To deny the king information of what is being done in a court in which he is presumed to be always

ARGUMENT

present would offer no greater anomaly than to deny the same information to the sovereign people of an American commonwealth.

To recognize the right of withholding from the public information of the proceedings of courts of justice would be to roll back the tide of history for centuries, and to surrender the ground which the advancing spirit of popular liberty has conquered from the arbitrary and despotic encroachments of governments. As said by Chief Justice Cockburn, in the case already cited, "the recognition of the right to publish the proceedings of courts of justice has been of modern growth. Till a comparatively recent time, the sanction of the judges was thought necessary, even for the publication of the decisions of the courts upon points of law." Blackstone, writing less than a century and a half ago, lays it down as the law of England at his day, that it was unlawful and a contempt of court to print "false accounts—or even true ones, without proper permission—of causes then dependent in judgment."*

This claim on the part of the judges was coeval with a similar claim on the part of the Houses of Parliament to prohibit the publication of their debates; and both were overthrown but a few years before the Revolution of the American Colonies, after the memorable contest between the House of Commons and the printers, in the days of John Wilkes. A century and a half ago in England, the

* 4 Bl. Com. 285.

Parliament and the courts undoubtedly claimed and exercised the right to prohibit the publication of their proceedings. The law there has not been formally changed. As to the courts, no statute has been passed altering the common law; and there is still a standing order in the journals of both Houses of Parliament prohibiting, even at this day, the publication of their debates. The enforcement of the claim has been paralyzed by the spirit of liberty and the force of public opinion. The Parliament which should undertake to-day to punish as a contempt the publication of its debates would be crushed under the weight of universal derision; and the judge who should attempt to withhold his decisions from the public would, if not held demented, certainly incur the risk of impeachment.

If the people have an inherent sovereign right to be informed of the proceedings of their own courts of justice, any attempt on the part of the Legislature, directly or indirectly through a judge, to deprive them of that right must be void. Secrecy in judicial proceedings is not only opposed to the true interests both of the courts and the people, but is repugnant to the whole spirit of American institutions and to the sentiments of a free people. The idea suggested by Star Chamber proceedings brings the mind back to the darkest epochs of tyranny and the times when a pliant, pusillanimous, and venal judiciary carried out in secret the behests of despotic monarchs.

ARGUMENT

It is not conceivable that the people of this State, in framing their government, ever contemplated that the Legislature should have the power to enact laws the enforcement of which would lead to withholding from the public information of the proceedings of courts of justice.

By the Declaration of Rights, which is part of the Constitution of 1849,* and of that of 1879,† there was guaranteed to every citizen of the State the right freely to speak, write, and publish his sentiments on all subjects. In view of this declaration, will it be claimed that it was ever contemplated that the proceedings of courts of justice and the decisions and conduct of judges should be withdrawn from public discussion, and should constitute subjects upon which the people should have no right to speak, write, or publish their sentiments? If it was not intended that these subjects should be withdrawn from public discussion, will it be claimed that it was ever contemplated that such proceedings, decisions, and conduct should be kept secret, and all information and knowledge concerning them, which alone could afford the basis for the formation of an intelligent opinion, should be withheld from the people?

The reasons for imparting to the community this information and knowledge are of the most cogent character. The judiciary are with us elected for

* Const. 1849, art. I., sec. 9.

† Const. 1879, art. I., sec. 9.

IN RE SHORTRIDGE

stated terms, at the end of which the people are periodically called upon to set the seal of their approbation or disapprobation upon the past performance of their judges, by re-electing or rejecting them. The only guide for the proper exercise of this right is a knowledge of the conduct of the judges during their incumbency of the bench. What greater folly could be imagined than to exclude the people from that knowledge, by drawing the veil of secrecy over the performance of judicial functions? In this condition of ignorance, not only would the people be bereft of one of their most important rights, but the judiciary itself would be the first to suffer; for while an unworthy judge might thus be able to escape censure for neglect or violation of duty, a deserving one could never be assured of the approbation or reward which should attend the proper discharge of public office.

There are still further reasons which protest against the secrecy of judicial proceedings. In discharging their functions courts not infrequently discover imperfections in the laws which they interpret. The defects thus perceived it is to the interest of the State to remedy. An injunction of secrecy upon the proceedings of courts would deprive the lawmaker of the knowledge of these defects, and condemn the laws to a state of irremediable and perpetual imperfectness. Did the people in framing our government ever contemplate such

ARGUMENT

a result? Furthermore, laws are in their operation what the judiciary declare them to be. The interpretation of judges is not seldom widely different from that which laymen, from a reading of the law, adopt. Yet the community must live and shape its conduct according to the laws as interpreted by the judges. How shall it do so if it is excluded from all knowledge of judicial proceedings?

That the people never meant that what takes place in their courts should be kept secret is manifest upon the face of the Constitution itself. It is provided by section 2 of article VI. that in the determination of causes all decisions of the Supreme Court, in banc or in department, shall be in writing, and the grounds of the decisions shall be stated, and by section 16 of the same article, that all opinions shall be free for publication by any person. It is true that by their language these provisions apply to the Supreme Court only; but can it for a moment be imagined that, while explicit provision was made for absolute publicity of the decisions of that court, it was intended that the proceedings of inferior tribunals might remain shrouded in secrecy? Vain and puerile would be the effort to withdraw from public gaze the proceedings of inferior courts if the decisions and judgments of the ultimate appellate tribunal are, by express command of the Constitution, public property. What could be gained by forbidding the publication of the proceedings had on the trial of a

cause in a Superior Court if everybody is at liberty to publish the decision in the same case on appeal, which may review and embody the whole of those proceedings?

The subject may be viewed from another stand-point. The Constitution, both of 1849 and of 1879,* declares that no law shall be passed to restrain or abridge the liberty of speech or of the press. The liberty of speech or of the press, as I have already endeavored to show, is the liberty to say or print whatever one may choose, short of interfering with the rights of others or giving offense to public decency or morality. If this is not what is meant by this section, it would be difficult to conceive what is that liberty which the framers of the Constitution have been at such pains to consecrate and declare inviolate from all attempted restraints or abridgments by the law-making power. Any law declaring illegal utterances or writings which do not so interfere or offend would be abridging and restraining the right of speech or of the press within narrower bounds than those prescribed by the Constitution. To say that it shall be unlawful for any citizen to speak of or publish the proceedings of courts of justice is to condemn such utterances or publications beforehand, regardless of the fact whether they do or do not interfere with the rights of others or offend public morality or decency. Concede the power

* Art. I., sec. 9.

ARGUMENT

to make such an enactment, and the liberty of speech and of the press is gone forever. If the proceedings of courts may be thus withdrawn from public discussion, so may those of the Senate, of the Assembly, of boards of supervisors, of city councils, of town trustees, and of all other public bodies. Nor, if the power to pass such a statute be admitted, need the Legislature stop here,—for there is no conceivable subject upon which it may not declare it unlawful to speak or write.

That the Legislature may within constitutional limits pass laws to define and punish the abuse of the liberty of speech or of the press, I do not question; but that it can say beforehand that a certain utterance which may be made or a certain writing which may be published in the future is *ipso facto* illegal I deny. That it can enact that libels of persons in office, as, for instance, the Governor or the judges of the Supreme Court, shall be punished is clear; but that it can say that it shall be a libel to speak or write about the conduct of the Governor of the State or the judges of the Supreme Court I deny. Whether words which I have uttered or written constitute slander or libel, and are therefore an abuse of my liberty, is a question upon which I have a right to be heard when called upon to answer for them; but to say beforehand that what I shall utter to-morrow upon a given subject will be a slander or a libel is to condemn me unheard. If I

have a constitutional right to speak, write, and publish my sentiments upon all subjects, and the Legislature is not permitted to restrain or abridge that right, a statute which forbids my speaking, writing, or publishing on a particular subject—for instance, the proceedings of courts or the conduct or decisions of judges—is an unconstitutional restraint and abridgment of my right.

Nor can this conclusion be eluded by claiming that the Legislature may exercise the power when, according to its wisdom, the public can be benefited thereby. This would leave the boundaries of action wholly at the discretion of the Legislature, and would be equivalent to saying that it might exercise the power in all cases if it chose. If the Legislature has the right to prevent the people from discussing or being informed of the proceedings in cases of seduction, criminal conversation, breach of promise of marriage, and divorce, it has an equal right of prevention in all cases. If it may do it in one, it may in all. The Constitution denies the existence of the power in every case.

But it is not to be assumed without the most cogent proof that the Legislature ever undertook to exercise such a power. No such evidence is found, I submit, in section 125 of the Code of Civil Procedure. On the contrary, the reverse is apparent. Had the Legislature intended by that section to prohibit, or to authorize the courts to prohibit, the publication of proceedings of cases tried in private,

ARGUMENT

it would have been easy to say so in plain terms, and it would have said so. It would not have left to intendment and inference the task of discovering its purpose. Its silence is the most significant proof that no such intent existed.

The learned Superior Court decides that to permit the publication of proceedings in divorce cases tried with closed doors is to frustrate the whole object which the Legislature had in view in enacting that section of the code. This decision has for its basis the assumption that the sole object of that section is to insure the absolute secrecy of such trials, to the end that the public may be protected from the contamination of the evidence not infrequently given in such cases.

As the basis of this argument consists in ascribing to the Legislature an intent to deny the people the right to know what is going on in their own courts, it should not be assumed, but demonstrated. I deny the assumption. I say that the sole purpose of the enactment is to regulate the mode of trial in court, and not the divulgement of the proceedings outside,—to protect the rights of the parties litigant, and not diminish the inherent privileges and liberties of the public.

The object of such an enactment is not difficult to conceive. In cases of seduction and criminal conversation the relation of the sexes always forms the main topic of the investigation, whilst in cases of divorce and breach of promise of marriage it is

not infrequently involved in the issue. The witnesses forced to testify on this subject are often females of modest demeanor and delicate sensibilities. To call upon them to reveal in the presence of a crowded assemblage affronts to their chastity, the violation of their own persons, or the coarse and vulgar epithets of conversations which they may have heard, would often impose a task beyond their strength. Modesty would seal the lips from which truth would in vain struggle to issue. The conflict between the efforts of the court to enforce its authority by compelling utterance and a witness whose tongue is paralyzed by terror and shame could not but be most painful. From this conflict there must inevitably ensue either a defeat, or, at least, a great embarrassment, of the administration of justice. I conceive that it is with a view to obviate these difficulties, by the exclusion of the audience from the court-room, that the section under consideration was enacted.

But it is said that the intention of the Legislature to prohibit the publication of the proceedings in actions for divorce is manifest from the provisions of section 1032 of the Political Code. That section provides that in all actions for divorce the pleadings and the testimony taken and filed in said actions shall not be made public by the clerk with whom the same are filed or the referee before whom the testimony is taken; nor shall the same be allowed to be inspected by any person except the parties

ARGUMENT

that may be interested or the attorneys to the action, or by an order of the court in which the action is pending.

If it was intended by this section to prohibit the publication of the testimony in actions for divorce, why is it not so stated in plain terms? The failure so to state is the most conclusive evidence that no such intention existed.

That the Legislature did not purpose by this section of the Political Code, or by section 125 of the Code of Civil Procedure, to insure the secrecy of the proceedings in actions for divorce is manifest from other provisions of the Constitution and the law. The defeated party in such an action may appeal to the Supreme Court, and file with its clerk a transcript, containing, it may be, the whole of the proceedings, the testimony included, of the lower court. The moment this is done the transcript becomes, by virtue of section 1032 of the Political Code, a public record, open at all times to the inspection of any citizen of the State. Besides, there is no provision in the law that the hearing of the appeal shall be had in private; on the contrary, by express constitutional requirement,* the court "is always open for the transaction of business." Nor is there any provision that the printed arguments of counsel, which may set forth the whole case, shall be kept secret. And, lastly, the appellate court in deciding the case is obliged under the

* Const., art. VI., sec. 2.

IN RE SHORTRIDGE

Constitution to render its decision and the reasons of its conclusions in writing.* This decision may embody and discuss the whole of the proceedings, including the testimony. The moment this decision is filed it is public property, and any one has the absolute constitutional right to publish it.† How utterly vain, then, must be all attempts to enjoin secrecy of the proceedings in actions for divorce!

It is submitted, in fine, that none of the sections of the code which have been cited have for their object the prohibition of the publication of the proceedings in cases of divorce, and that if they have, they are in that respect unconstitutional.

I have thus endeavored to subject the positions of the court and of my learned adversaries to the test of reason and fundamental principles. I may be permitted to remark that if I have referred to no authorities, it is because in such a discussion precedents could afford little aid. I have no doubt that my learned friends opposite are ready with precedents on their side. They were cited in the court below, and may again be here. Decisions may be adduced to show that, at common law, English judges possessed and exercised the power to prohibit in all cases the publication of the proceedings of their courts. But has American liberty made so little advance that its limits to-day must be determined by the precedents of a former age and another

* Const., art. VI., sec. 2. † Id., art. VI., sec. 16.

ARGUMENT

country? Granting that there are such precedents in England, has the liberty of free utterance and a free press made no progress since the days when in that realm the Church and the State undertook to prohibit all books which did not receive their sanction and license; the days when Sir Thomas More died upon the scaffold a martyr in the cause of liberty of conscience; the days when Speakers of the House of Commons went upon their knees at the feet of their sovereign to crave forgiveness for undue indulgence in the freedom of debate; the days when a member was sent to the Tower for daring to publish his speeches in Parliament, and his book was burned by the public hangman; the days when Sydney's Discourse upon the Principles of Government brought him to the block; the days when Mansfield—even Mansfield—prostituted the principles of the law of libel to serve a party in power; the days when every comment upon the ministers of the crown was deemed a seditious utterance; the days when the eloquence of Erskine was tasked to its uttermost to avert the punishment of Stockdale, and across the Irish Channel the genius of Curran strove in vain to save Rowan from the pillory?

Why should we pause, then, curiously to trace the course of judicial decisions of bygone generations? The stride of the full-grown man is not to be cramped into the footprints of the child. The flight of the eagle soaring above the clouds and

measuring the distance from mountain peak to mountain peak is not to be circumscribed within the bounds of the nest which limited the first fluttering of its callow pinions. We are dealing here with a question of liberty under our Constitution and form of government. You cannot gauge it by the rules of an age when constitutions were unknown and personal liberty was a delusion. The light which is to guide your footsteps is not the light of the past, but of the present. Vain would be all attempt to ignore it. You might as well bid the commander who by the search-light at his mast-head steers the stately ironclad through the darkness, and with the rapidity of thought throws a dazzling splendor upon the outermost bound of the horizon, discard the lightning which he has torn from the clouds and trace his course by the rays of the pine torch with which the Indian guides his canoe through the rapids of the Truckee ; you might as well bid the astronomer who from the heights of Hamilton scans the heavens, explores the configuration of the planets, determines the composition and measures the distance of the stars, throw aside the glass which the genius of modern science has given him and take up instead the rude instrument with which, before the birth of Christ, Egyptian priests or Chaldean shepherds watched Orion and the Pleiades, as tell us that, standing to-day upon the threshold of the twentieth century, we are to shut our eyes to the effulgence which the spirit of liberty throws

ARGUMENT

around us, and guide our footsteps by the lamp of the dead past, snatched from the charnel-house where the forgotten judges of Plantagenet, or Tudor, or Stuart dynasties lie buried.

TO THE SUPREME COURT OF THE
UNITED STATES

THE following argument was made in the Supreme Court of the United States on the 26th day of January, 1885. The case is reported in 118 Wall., p. 394. Though the Court avoided, at that time, a decision of the important constitutional questions discussed, the views here presented by Mr. Delmas ultimately prevailed; and, after a contest extending over a period of thirteen years,—1882 to 1895,—the railroad companies were finally compelled to pay their taxes. The last decision upon the subject is that of People vs. Central Pacific R. R. Co., 105 Cal., p. 576.

IN THE RAILROAD TAX CASES

MAY IT PLEASE YOUR HONORS: This litigation involves the validity of the Constitution and statutes of California relating to the taxation of railroads. After a controversy covering a period of six years, the people of that State are now at your bar, to learn at last whether they have any laws by which the vast property of railroad corporations which receives the protection of their government can be made to bear its share of the public burdens, or whether the scheme of taxation devised by the framers of their Constitution, carried out by their legislators, and approved by their highest court of law, is a nullity. They are here to learn not only whether the vast sums of six years' unpaid revenue, for which these corporations stand delinquent to the State, must be forever lost to the treasury, but, also, whether the expense, loss of time, and labor of reframing or amending their Constitution must be assumed anew.

That these are grave questions no one, I think, will doubt. That they lie within a narrow compass, and that the difficulty of their solution is not



ARGUMENT

commensurate with their magnitude, it will now be my endeavor to demonstrate.

The portions of the Constitution which the defendant attacks are sections 1 and 4 of article XIII.* The statute assailed is section 3664 of the Political Code.†

* These sections read as follows :—

“ Section 1. All property in the State, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law. The word ‘property,’ as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership.

“ Section 4. A mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby. *Except as to railroad and other quasi-public corporations,* in case of debts so secured, the value of the property affected by such mortgage, deed of trust, contract, or obligation, less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof, in the county, city, or district in which the property affected thereby is situate. The taxes so levied shall be a lien upon the property and security, and may be paid by either party to such security; if paid by the owner of the security, the tax so levied upon the property affected thereby shall become a part of the debt so secured; if the owner of the property shall pay the tax so levied on such security, it shall constitute a payment thereon, and to the extent of such payment, a full discharge thereof.”

† That section is in these words :—

“ Section 3664. On or before the first Monday in May in each year the State Board of Equalization shall assess the franchise,

IN THE RAILROAD TAX CASES

In order to understand the character of the attack upon this section, it is necessary to observe, at the outset, that section 9 of article XIII. of the Constitution provides for the election and organization of a State Board of Equalization. To this board is confided the duty of assessing the franchise, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county in the State. All other property is assessed by the local assessors of each county. The State Board of Equalization has its office at the State capital; and section 3692 of the Political Code provides

roadway, roadbed, rails, and rolling stock of railroads operated in more than one county. The president, secretary, cashier, or managing agent, or such other officer as the State Board of Equalization may designate, of any corporation operating any railway in more than one county in this State, shall furnish said board, on or before the first Monday of April, in each year, a statement, signed and sworn to by one of such officers, showing in detail for the year ending on the first Monday in March, in such year :—

“(a) The whole number of miles of railway owned, operated, or leased in the State by such corporation, making the return, and the value thereof per mile, with a detailed statement of all property of every kind located in the State.

“(b) Also a detailed statement of the number and value thereof of engines, passenger, mail, express, baggage, freight and other cars or property used in operating or repairing such railway in this State, and on railways which are parts of lines extending beyond the limits of this State. The returns shall show the actual amount of rolling stock in use on the corporation’s line in the State during the year for which the return is made. The return shall show the amount of rolling-stock, the annual gross earnings of the entire railway, and the proportionate annual gross earnings of the

ARGUMENT

that it is "to hold regular meetings at the State capital on the second Monday in each month, and such special meetings as the chairman may direct."

The validity of these provisions of the Constitution and Code has been fully settled, so far as the State is concerned, by the decision of the Supreme Court of California.* Upon well-established principles, that decision is binding upon this

same in this State, as nearly as practicable, and all the property designated hereafter in this section, and such other facts as the State Board of Equalization may in writing require.

"If such officer or officers so designated shall fail to make and furnish said statements, said Board of Equalization shall fix the value and proceed to assess the property of the corporations so failing; the valuation so fixed by them shall be final and conclusive. The said property shall be assessed at its actual value. Assessment shall be made upon the entire railway within the State, and shall include the right of way, roadbed, track, bridges, culverts, and rolling stock. The depots, station grounds, shops, buildings, and gravel beds shall be assessed by the assessor of the county where situated, as other property. On or before the fifteenth day of May, in each year, said board shall transmit to the county assessor of each county through which any railway, operated in more than one county, may run, a statement showing the length of the main track or tracks of such railway within the county, together with a description of the whole of said tracks within the county, including the right of way by metes and bounds, or other description sufficient for identification, and the assessed value per mile of the same, as fixed by a *pro rata* distribution per mile of the assessed value of the whole franchise, roadway, roadbed, rails, and rolling stock of such railway within this State. Said statement shall be entered on the assessment roll of the county."

* Central Pacific R. R. Co. vs. the State Board of Equalization, 60 Cal. 35.

IN THE RAILROAD TAX CASES

Court as to any right claimed under the State merely. As to rights claimed under the Constitution of the United States, it has, of course, no authority here. Still it narrows the field of inquiry to the single question, Do these provisions of the Constitution and Code of California contravene the Federal Constitution?

The defendant claims that they do, upon three grounds. Its contention is as follows:—

First—The defendant is a Federal corporation. Its franchise is derived from the Federal Government. It is not, therefore, subject to State taxation. And since, upon the face of the assessment on which the plaintiff relies, the whole property of the corporation is assessed in gross, and the value set upon the franchise cannot be determined or separately ascertained, it follows that the whole assessment fails, and the tax cannot be collected.

Secondly—Neither the Constitution of the State nor its Code provides for giving the defendant notice of the assessment of its property, nor opportunity to be heard therein. Therefore, they contravene that part of the Fourteenth Amendment which requires that no person shall be deprived of property without due process of law.

Thirdly—The Constitution, in declaring that a mortgage shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby, in the case of private property, but not in the case of property of a rail-

ARGUMENT

road or other quasi-public corporation, and in declaring further that in the case of private property the amount assessed to the owner shall be the value of the property less the value of the mortgage interest, but in the case of railroad and other quasi-public corporations the whole value of the property shall be assessed without any deduction for the mortgage interest, violates that portion of the Fourteenth Amendment which provides that no State shall deny to any person within its jurisdiction the equal protection of the laws.

This, I believe, is the statement of defendant's positions in their logical order, and in that order I shall now examine them.

The first contention is met and rejected by the opinion of Mr. Justice Field, delivered in this case in the Circuit Court. I cannot hope to add anything to the reasoning of the learned Justice.

To the second contention, relating to notice and opportunity to be heard in the assessment, the late decision of this Court in the Kentucky tax case affords a complete answer.

The third contention, briefly stated, is, that our Constitution denies the defendant the equal protection of the laws, in that, whilst it permits the deduction of the value of the mortgage interest in the assessment of private property, such deduction is inhibited in the assessment of the property of railroad and other quasi-public corporations.

In defending the provisions of our Constitution,

IN THE RAILROAD TAX CASES

permit me, in the first place, to reply to an attack made upon it, which, if tenable, would place the organic law of California in a position ridiculous in the extreme.

The learned Circuit Court, in examining the Constitution, finds it, according to its reading, to declare in terms that a mortgage is made, *in all cases*, for purposes of taxation, an interest in the property assessed; that this interest, which, by the construction of the Court, is declared to belong in all cases to the mortgagee, must, nevertheless, in the case of railroad and other quasi-public corporations, be assessed to the mortgagor. That I may state this position aright, I must beg leave to refer to the record. There Mr. Justice Field says:—

“It [the Constitution] also declares that a mortgage, deed of trust, contract, or other obligation by which a debt is secured shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby. And that, except as to railroad and other quasi-public corporations, in case of debts so secured, the value of the property affected by such mortgage, deed of trust, contract, or obligation, less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof. . . . A mortgage, as seen by the provisions of the Constitution quoted above, is deemed and treated for the purposes of assessment and taxation as an interest in the property affected. . . . By the Constitution

ARGUMENT

a mortgage, for the purpose of assessment and taxation, operates in like manner to transfer the mortgagor's interest to the extent represented by the amount secured. . . . If, by a mortgage on the property of railroad or other quasi-public corporations, a taxable interest in such property is transferred by the corporation to another, or the whole interest is vested in him, the holder of such interest is exempted from taxation for it, and the corporation is assessed and taxed for it notwithstanding the transfer. . . . On what principle, or by what species of reasoning, a tax upon property can be upheld and assessed against a party, be the party a natural or an artificial person, when the taxable interest in it had, at the time of the levy of the tax, been transferred to another, I am at a loss to understand. . . . That the proceedings by which the taxes claimed in these several actions were levied against the railroad companies on taxable interests with which they had parted was not due process of law, seems to me so obviously true as to require no further illustration. It goes almost without saying; and any additional argument would rather tend to obscure a truth which should be evident upon the simple statement."*

The learned Justice concludes this arraignment of the Constitution by saying:—

" This position of the case was suggested to counsel on more than one occasion during the argument, and no answer was made to it. To every other position an answer was attempted, but to this none; and, as

* Pages 88, 89, 90, and 99.

IN THE RAILROAD TAX CASES

we think, for the best of reasons, because none was possible."

This position of the learned Circuit Court has never been taken by any of the numerous and eminent counsel for the defendant who have argued this cause here and elsewhere, and, I think, for the simple reason that the position is based upon an obvious misreading and palpable misconstruction of the language criticised. This misreading and misconstruction were pointed out in the court below by counsel for plaintiff, who said :—

"Now, I think that the reading of that would be very much improved by a change of the punctuation. As it stands it reads: 'A mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby.' There is a full stop there. We think it ought not to be there. It ought to read: 'Shall be deemed and treated as an interest in the property affected thereby, except as to railroad and other quasi-public corporations.'"

Counsel for defendant here are forced to abandon the position taken by the Circuit Court, by admitting that its reading of the Constitution is wrong, and the reading of the plaintiff right. Say counsel in the brief here :—

"There is an obvious mistake in punctuation in the language I am about to quote. The period which is placed after the word 'thereby' should have been

ARGUMENT

placed after the word ‘corporations’ in the next line. . . . In quoting the passage in question, I shall, therefore, put the period after the word ‘corporations.’ It then reads as follows: ‘A mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby, *except as to railroad and other quasi-public corporations.*’”*

Indeed, long before the argument of this cause at Circuit, the Supreme Court of California had construed this section of the Constitution and declared it to mean what the counsel for plaintiff contended for in the court below, and what the counsel for defendant admit here. It had said:—

“Reading the whole section, it seems very plain that as to mortgages, deeds of trust, contracts, or other obligations secured upon the property of railroad and other quasi-public corporations, they should not be deemed and treated as an interest in the property affected by them ‘for the purposes of taxation.’”†

Instead, therefore, of holding the Constitution to say that a mortgage is, in every case, an interest in the property, it must be held to say that, in the case of railroad and other quasi-public corporations, it is not such an interest. Thus read, the Constitution,

* Page 30.

† Central Pacific R. R. Co. vs. State Board of Equalization,
60 Cal. 35, 59.

IN THE RAILROAD TAX CASES

whatever its other imperfections, is readily absolved from the absurdity of deliberately declaring in one and the same breath that certain property belongs to A, but shall, nevertheless, be assessed to B.

But it is next urged that even if a mortgage be considered in the light of a mere charge upon the property affected, still, as the Constitution makes it an element of deduction in the valuation of private property, and not in that of railroad property, there is here a plain and injurious discrimination against railroad property. The learned Circuit Justice states this position very clearly, as follows:—

“If any element which is taken into consideration in the valuation of the property of one party be omitted in the valuation of the property of another, a discrimination is made against one and in favor of the other, which destroys the uniformity so essential to all just and equal taxation. Such an element exists where, in the assessment of property subject to a mortgage, the value of the mortgage is deducted if the property be owned by a natural person, and is not deducted if owned by a railroad corporation. And the Constitution of the State declares that, in the ascertainment of values as the basis of taxation, such deduction shall be allowed in the one case and denied in the other.”*

Before undertaking the defense of our Constitution upon this point, permit me first to observe, that if to take an element into consideration in the

* Page 92 of the Record.

ARGUMENT

valuation of certain property and to omit it in that of other property, or if, in valuing property, to permit a deduction for the owner's debts in certain cases and to forbid it in others, "destroys the uniformity so essential to all just taxation," and is a sin against the Federal Constitution, California is not the only State which has offended. Alabama, Nebraska, Illinois, and Pennsylvania are all equally guilty.*

* The Code of Alabama of 1876 (sec. 362, subd. 8) provides that all "money loaned, and solvent credits, or credits of value," shall be assessed. Section 365, subdivision 3, speaks of assessing "lien notes, mortgage notes, and other notes." Under section 372, in the case of building and loan associations, the notes and mortgages of the stockholders or members of such associations, given to the associations for purchase-money or advances of stock made at the distribution of the funds thereof, are exempt from taxation. Yet the Constitution of the State provides that all property shall be assessed in exact proportion to its value, and the property of corporations at the same rate. (Const., art. II., sec. 1., subd. 6.)

In Nebraska, the taxpayer is assessed for credits, but is allowed "to deduct from the gross amount of credits the amount of all *bona fide* debts owing by such person, company, or corporation to any other person, company, or corporation, . . . provided, that nothing in this section shall be so construed as to apply to any bank company or corporation exercising banking powers or privileges." (Comp. Stats. 1881, Revenue, sec. 27, p. 404.)

Precisely the same rule prevails in Illinois. (Revised Stats. 1880, p. 873, sec. 27.)

In Pennsylvania, "mortgages, money owing by insolvent debtors, . . . owned or possessed by any person or persons whatsoever, *except* . . . obligations given to banks for money loaned," shall be taxed. Mortgages are exempt from all taxation except for State purposes, "provided, the provisions of this act shall not

IN THE RAILROAD TAX CASES

The basis of the whole argument of the learned Circuit Court upon this question of discrimination lies in the assumption that in the levy of a property tax the State is bound to treat railroad property precisely like private property, and is permitted to make no discrimination whatever between them. If this be so, it is safe to say that there is hardly a State in this Union whose revenue system is not in danger of overthrow. There is hardly a State which does not apply to railroad property a special mode, either of valuation, assessment, or taxation. Among those which do so are numbered Alabama, Arkansas, Connecticut, Delaware, Kentucky, Maine, Michigan, Mississippi, Nebraska, New Hampshire, Ohio, South Carolina, and Virginia. *

apply to building and loan associations." (Laws of 1881, p. 99, sec. 1.)

Further: "All mortgages . . . shall be exempt from all taxation except for State purposes, . . . provided, that nothing in this act shall be construed to apply to mortgages . . . given by *corporations*; provided, that this act shall only apply to the counties of Berks, Schuylkill," etc. (Brightly's Purdon's Dig., 1369, sec. 83.)

* In Alabama, the law fixes the minimum valuation of railroad property — that minimum being a sum which, if placed out at interest at eight per cent. per annum, would yield the yearly net earnings of the road. (Code, sec. 383.)

This system of valuation is applied to railroad property alone. No such minimum value, or mode of valuation, is applicable to other property.

In Arkansas, "the roadbed, water and wood stations, stations, and such other realty as is necessary to the daily running operations

ARGUMENT

These various revenue systems of the States demonstrate that, in practice at least, the rule of uniformity, which, it is stoutly maintained here, requires that railroad property shall not be burdened differently from other property, is seldom observed. Indeed, this course of legislation fully illustrates the language of this Court, speaking through Mr. Justice Field, in the Delaware Railroad Tax Cases,* that

of the road, shall be treated and estimated as personal property.”
(Gant. Dig., 5099.)

This treatment of realty as personal property is applied to the realty of railroads alone. No such rule obtains as to other realty.

In Connecticut, a railroad pays, in lieu of all other taxes, on its franchise, funded and floating debt, and property, a tax of one per cent. on the market value of its stock and funded and floating debt, after deducting from such valuation the amount of cash on hand, and from the amount required to be paid the amount paid for taxes on its real estate not used for railroad purposes. The statute declares that the valuation so made shall be the measure of the value of such railroad, its rights, franchises, and property in the State. (Gen. Stats. 1875, p. 717, sec. 46.)

Note here that this mode, both of assessment and taxation, is special and applicable to railroad property alone. The mode of valuing the property is special. The tax imposed—one per cent.—may be more or less than that imposed upon other property in the State. If more, then, according to defendant’s theory, the company might complain ; if less, the other taxpayers might feel aggrieved.

In Delaware, a special tax is imposed upon incorporated railroads of ten per cent. of their annual net income ; besides one hundred dollars for every engine, twenty-five dollars for each passenger-car, ten dollars for each freight-car, and one-half of one per cent. upon the cash value of every share of stock. One particular road—the

* 18 Wall, 231.

IN THE RAILROAD TAX CASES

"the State may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation or the separate corporate property. And the manner in which the value shall be assessed, and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion."

It may be answered that these various revenue

Philadelphia, Wilmington, and Baltimore Railroad—is allowed to pay a gross sum of twenty-seven thousand dollars per annum in lieu of all taxes, with certain exceptions. (Codes, 1874, p. 41.)

In Kentucky, it is provided that railroads shall be assessed for taxation at the rate of twenty thousand dollars per mile for broad-gauge roads, and ten thousand dollars for narrow-gauge. They are to pay upon this valuation "the same rate of tax on the assessment as is levied by law on real estate." (Gen. Stats. 1883, p. 744.)

In Maine, under the act of 1880 (ch. 249), the Governor and Council are to appraise the several railroads in the State, with their franchises, rolling stock, and fixtures, at their cash value, and upon this valuation to levy a tax of one per cent. The Constitution requires all taxes upon real and personal estate to be apportioned and assessed equally, according to its value.

In Michigan, the Constitution expressly declares that the Legislature may provide for the collection of specific taxes from railroad and other corporations. (Art. XIV., sec. 10.)

In Mississippi, the Constitution provides that taxation shall be equal and uniform,—all property shall be taxed in proportion to its value. (Const., art. XIII., sec. 20.)

The value of railroad property is ascertained by a board in a special way; but certain enumerated companies are allowed to pay a gross tax of so much per mile, "and," says the code, "the payment shall be in full of all State and county taxes." (Revised Code, 1880, secs. 489, 597, 599, 607, 608.)

In Nebraska, railroad property is assessed by a board, "and,"

ARGUMENT

systems are all unconstitutional. It will, I think, require no little boldness to assert that so many States have legislated in ignorance or in defiance of the principles of the Federal Constitution or their own organic law of equality. At all events, the universality of the practice of discrimination suggests, at least, some common ground of action, some common principle of legislation. That principle is, I conceive, the right of classification of property in matters of taxation. The revenue systems of the various

says the statute, "such property shall, for the purpose of taxation, be deemed personal property." (Com. Stats. 1881, p. 407, secs. 39, 40.)

In New Hampshire, railroads are taxed specially ; but railroads "the construction of which was commenced since the fifteenth day of September, 1868, or hereafter constructed in this State," are exempt from taxation for ten years. (Gen. Laws, 1878, pp. 159, 160.)

In Ohio, a State board assesses of railroads "all the personal property, which shall be held to include roadbed, water and wood stations, and such other realty as is necessary to the daily running operations of the road." (Rev. Stats. 1880, sec. 2770.)

In South Carolina, the law provides that "the roadbed, right of way, station buildings, toll-houses, structures, and real estate owned and necessarily used by any railroad . . . company in the prosecution of its business, shall, if the company be organized in this State, be treated as personal property." (Gen. Stats. 1882, secs. 179, 180.)

In Virginia, the Constitution provides that "taxation shall be equal and uniform ; all property shall be taxed in proportion to its value." (Const. of 1870, art. X., sec. 1.) Yet a special tax of fifty cents on the hundred dollars is laid "on the real and personal property of every railroad and canal company." (Code of 1873, p. 349, sec. 8.)

IN THE RAILROAD TAX CASES

States show that it has been the practice to classify railroad property,—to make of it a class apart,—and to apply to it special modes of valuation, assessment, and taxation, and to impose upon it special burdens, not applied to and not imposed upon any other kind of property.

This right of classification I do not understand to be denied by the defendant; and if it were, it is universally recognized, and has been expressly sanctioned by this Court in the Kentucky tax case. Says the Court there:—

“There is nothing to forbid the classification of property for the purposes of taxation and the valuation of different classes by different methods. The rule of equality, in respect to the subject, only requires the same means and methods to be applied impartially to all constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances. There is no objection, therefore, to the discrimination made as between railroad companies and other corporations in the methods and instrumentalities by which the value of their property is ascertained. The different nature and uses of their property justify the discrimination in this respect which the Legislature has seen fit to impose.”

What is there, then, to inhibit the State of California from classifying the property of railroads and other quasi-public corporations, and applying to it a system of valuation and taxation different from

ARGUMENT

that applicable to private property? The fact that such property is affected with a public use affixes to it at once a badge to distinguish it from other property. It is, by its very nature, made to enjoy special privileges and to bear certain special burdens not enjoyed or borne by other property. The use of property dedicated to a public use is subject to regulation by the public—a burden not imposed upon strictly private property. The enjoyment of such property carries with it the right of eminent domain, which is not accorded to the enjoyment of strictly private property. As an agency of the sovereign, it enjoys certain sovereign attributes, and is subjected to a certain corresponding sovereign control. And the fact that it is an agency of the sovereign—an instrument of state—might well, in the wisdom of the sovereign, lead to its absolute exemption from any other public burdens than such as necessarily attach to it. But if such an exemption would be no discrimination of which other property could complain, so an unfavorable discrimination by which it is burdened is not a ground upon which it can complain. But grant the power to make a discrimination, and the question of advantage or disadvantage becomes at once immaterial.

Certain objections are made, however, to the classification contained in our Constitution, which I purpose now briefly to consider.

It is urged, in the first place, that while the Constitution might have classified—and properly classi-

IN THE RAILROAD TAX CASES

fied—the property essential to the operation of the road, yet if the classification extends to all the property of the railroad company,—as well that which is essential to the operation of the road as that which is not,—then the classification is vicious and void. This claim is put forward on the strength of the fact that this defendant owns certain lands, which are said to be farming and grazing lands, not connected with the operation of its railroad.

I answer, that the Southern Pacific Railroad Company was never organized to go into the business of farming and grazing; that the framers of the Constitution cannot be supposed to have known that that corporation had transcended the limits of its charter to follow agricultural and pastoral pursuits. The only legitimate business of the corporation was and is to operate a railroad. To that all its property and all its actions must be made subservient. If it owns an office in the city of San Francisco in which its books are kept, its tickets sold, its funds received or disbursed, its general business centered and distributed, that office, though real property, removed from any actual line of railroad, is yet in every sense railroad property, as essential to the proper conduct of the business of the company as is the rail upon the roadbed, the signal upon the switch, or the roundhouse at the station.

By the very act of its incorporation,—the statute of 1861,—the company has no power to hold real property other than such as is “necessary for the

ARGUMENT

construction, completion, and maintenance of such railroad," and if it may take voluntary grants of real estate, still these must be confined to such as are made "to aid and encourage the construction, maintenance, and accommodation of such railroad." The whole of its property is thus made to subserve the road. Its real estate is but an adjunct to the road—an aid—which the corporation is allowed to hold only because it is an aid to the road. It, like the road, is dedicated to and subserves a public use.

In the Kentucky tax case, the special mode of taxation applicable to railroad corporations was justified and upheld by this Court upon the ground of classification of property; yet we find that the classification was not confined to property actually used in the operation of the road. The words of classification, as with us, comprised the whole property of the corporation. Said the statute:—

"The president or other chief officer of each railroad company . . . shall . . . return . . . the total length of such railroad, including the length thereof beyond the limits of the State, and designating its length within this State, and in each county, city, and incorporate town therein, together with the average value per mile thereof, . . . including engines, and cars; and a list of the depot grounds and improvements, *and other real estate of the said company*, and the value thereof."

The action was brought to recover the taxes assessed on "defendant's line of railroad lying in

IN THE RAILROAD TAX CASES

this State, . . . together with the rolling stock, engines, cars, depot grounds, improvements, *and other real estate.*"

But grant that the grazing and farming lands of the company could not properly be classified as strictly railroad property, what follows? Simply this: that in classifying railroad property the Constitution uses descriptive words, which, being too broad, include with property which is strictly classifiable some property which cannot properly be classified with it. But does it follow, therefore, that the classification must utterly fail? Does it follow that the purpose of the framers of the Constitution must be wholly frustrated because in doing what they legitimately could do they coupled with it an attempt to do what they legitimately could not do? Must such a result follow when the bounds between the exercise of legitimate power and illegitimate assumption are as easily defined as they are here? Let it be observed and remembered that the two classes of property of railroad companies—the railroad proper, which it is admitted can be classified, and these outside lands, which it is claimed can not be classified—are, by the Constitution, subjected to two absolutely distinct systems of assessment. Each is assessed separately, at different times, and by different officials. The railroad proper is assessed by the State Board of Equalization, and its description and value are set down in its books. The outside property is assessed by the local assessors,

ARGUMENT

and its description and value are set down in their books. Thus the two classes of property are always kept separate.

Now, for the taxes upon these outside lands no claim is made in this action. On the contrary, it is found as a fact that upon these lands, whose presence in the classification is, it is claimed, the only element which renders the whole classification void, the taxes have been fully paid.* The only tax involved here is a tax upon the road—property which it is not denied is properly classified.

Why, then, shall not the classification as to the road hold good? The part of the classification which is claimed to be bad can be readily eliminated,—nay, has already been eliminated by the action of the defendant itself. Why, then, shall not the classification stand as to the balance, which is confessedly good? Why shall the defendant be permitted to escape taxation upon the good part, when it has already taken the bad out of the controversy by voluntarily paying the taxes upon it?

A striking and pertinent illustration and application of the proposition that I am now trying to establish is found in the case of the State Freight Tax. There the State of Pennsylvania had passed a law imposing an indiscriminate tax upon all the freight carried by railways in Pennsylvania. Now, the State could constitutionally impose the tax upon

* Twenty-sixth Finding, Record, pp. 72, 73.

IN THE RAILROAD TAX CASES

freight received for carriage wholly within the State, but not upon freight received for carriage to or from any part outside the State. Did it follow that the whole tax was void? No; the good was separated from the bad.

Permit me to read the epitome of the case from this opinion of Mr. Justice Miller, in Stanley vs. The Supervisors, because it sets forth clearly and distinctly the point which I am now addressing myself to. The Court said here:—

“The case of the State Freight Tax, 15 Wallace, 232, arose out of a statute of Pennsylvania which attempted to impose a tax on commerce forbidden by the Constitution of the United States. The act imposed a tax upon every ton of freight carried by every railroad company, steamboat company, and canal company doing business within the State. The railroad companies who contested the tax presented a statement, which separated the freight transported by them between points solely within the State, and limited to such destination, and that which was received from or carried beyond those limits. This Court held the latter to be void as a tax on interstate commerce, and did not declare the whole tax or the whole statute void. It said: *It is not the purpose of the law, but its effect, which we are now considering*, nor is it at all material that the tax is levied upon all freight, as well that which is wholly internal as that embarked in interstate commerce. The conclusion of the whole is that, in our opinion, the act of the Legislature of Pennsylvania

ARGUMENT

of August 25, 1864, so far as it applies to articles carried through the State, or articles taken up in the State and carried out of it, or articles taken up without the State and brought into it, is unconstitutional and void. The same language is repeated in Erie Railway Company vs. Pennsylvania, decided at the same time. Both cases were remanded to the State Court for further proceedings, in conformity with the opinion, which could only mean to enforce the tax on transportation limited to the State, and not on interstate commerce. This is a clear case of distinguishing between the articles protected by the Constitution of the United States and those which were not, *though nothing in the language of the statute authorized any such distinction.*" *

I submit that this is a parallel case to the one at bar. There the State imposed an indiscriminate tax, part good, part bad. The taxpayer came into court, and showed what part was good and what bad—what part the State could impose and what not. The Supreme Court said that although the tax was a unit, yet as the good could be readily segregated from the bad, it would leave the good to stand, and simply eliminate the bad. So I say here, if we grant that the inclusion of the farming and grazing lands of the company in the class of railroad property is not permissible, still, as the strictly railroad property is properly classified, the classification made by the law will stand as to the latter, and the former alone will be excluded.

* 105 U. S.

IN THE RAILROAD TAX CASES

But it is further urged that the Constitution shows upon its face that the classification is of persons and not of property, because the language used does not in terms speak of railroad property, but of property of railroad corporations.

The Constitutional Convention knew that at the time it wrote there was no railroad property in California which was not owned by a railroad corporation. It is true that certain statutes of the State were given in evidence here, granting to certain individuals railroad franchises; but the case shows that such roads have never been built, never have had any existence as property. The phrase, then, "the property of railroad corporations," was at the time it was used in California the equivalent of "all railroad property." It is true that since the Constitution was adopted an insignificant local road of twenty-six and a half miles in length has, under foreclosure proceedings, passed into the hands of a private individual. But it is submitted that this unusual, and no doubt merely temporary, mode of ownership does not destroy a classification which when made was made by words which then aptly described, and in the ordinary course of things are well calculated to describe, the property intended to be classified.

I submit upon this question two propositions: First, if in making a classification, the lawmaker uses language sufficient, according to the ordinary course of things, to describe the property intended,

ARGUMENT

the classification does not fail from the fact that some insignificant part of the property intended is not covered by the descriptive words used; and, secondly, if in making a classification descriptive words are used which are at the time sufficient to include and cover the whole of the property classified, the classification is not avoided and annulled because subsequently some insignificant portion of the property is, by an unusual and extraordinary course of dealing, withdrawn from the scope of the descriptive words.

In the Kentucky tax case, this Court, as already stated, upheld the system of taxation on the ground of classification of railroad property; yet the descriptive words by which the classification was made were not "railroad property," but "the property of railroad companies"; and the whole tenor of the statute shows that the system presented could only be applied to the property of *corporations* owning railroads. The very title of the statute is, "An act to prescribe the mode of ascertaining the value of the property of railroad companies for taxation, and for taxing the same." The first section provides for a report which can only be made by "the president or chief officer of each *railroad company or other corporation* owning a railroad," while the fourth provides for a notice to be given to "each railroad *company* of the amount of its assessment."

It is perfectly apparent that this Court understood the words "railroad property" and "property

IN THE RAILROAD TAX CASES

of railroad companies" to mean one and the same thing; for it declares the act to have classified railroad property, and says, "in the legislation of Kentucky on the subject, railroad property is classified by itself," though, as I have shown, the act throughout speaks of the property of railroad corporations, and never in terms of "railroad property."

Now, I ask, would the Court have listened to the argument that there was no classification because the act did not speak of property, but of particular owners of property? Could it have been successfully urged here that there was no classification because private persons as well as corporations might own a railroad? Would the Court have declared the classification void, though it had been shown that after the passage of the statute some private person had bought an insignificant portion of a Kentucky railroad? The truth is that the words "railroad property" and "property of railroad companies" are universally understood to mean one and the same thing.

If these views are correct, they dispose of this branch of the case, for if it is once admitted that railroad property is classifiable, and that our Constitution has classified it, then any system of taxation applied to it, however discriminatory, does not fall within the inhibition of the Fourteenth Amendment.

There is another view of this subject of classifi-

ARGUMENT

cation which, to my mind, is no less conclusive. The same law which provides for the assessment of mortgages may classify them according to their distinctive characteristics, and may, according to the wisdom of the legislators, exempt a certain class altogether from taxation. This is what has been done here.

The history of the Constitution of 1879 shows that the provisions regarding the taxation of mortgages arose from a public desire to subject the lenders of money to the burdens of taxation. This was accomplished by declaring that a mortgage should be deemed and treated as an interest in the property affected, and "assessed and taxed to the owner thereof," and, in order to avoid double taxation, that the residue only of the property—the value of the property less the value of the security—should be assessed to the mortgagor.

When the convention had reached this point, it was reminded that there were mortgages made by railroad and other quasi-public corporations of the State to secure large amounts of bonds owned in all parts of the world. The difficulty of making the general provisions of the Constitution applicable to the mortgages of these corporations was at once apparent and insuperable. The mortgages of the Central Pacific Company, for instance, covered property in the State and outside of the State. Those of the Southern Pacific Company, besides the railways, depots, and grounds, covered

IN THE RAILROAD TAX CASES

a large quantity of personal property, such as "machinery, weighing-scales, and tools." It affected a land-grant of eleven million acres,—a grant partly earned and partly unearned, partly patented and partly unpatented, the title to a portion of which only had vested in the company, the rest remaining in the Government,—a land-grant continually shifting in its proportions, increasing on one side by new patents received from the Government, and decreasing on the other by sales made by the company.

When the convention came to face the problem of apportioning the value of these mortgages among the various counties of the State,—how it should be deducted from the various parcels of the companies' property, how much of it was to be borne by the main trunk, how much by the branch roads, how much by the depot grounds and yards, how much by the outlying lands, how much by the personal property,—when it considered the fact that the mortgages covered bonds that might issue in the future, or might at any time be redeemed, and that it was impossible for any assessor to ascertain how many bonds were actually outstanding, or who or where were the owners of them, and the further fact that the mortgages upon the Central Pacific Railroad covered property partly in the State and partly out of the State, and that it was extremely difficult, if not impossible, to ascertain what relative proportion of the security was in the State and what out,—when, I say, the framers of the Constitu-

ARGUMENT

tion were brought face to face with these difficulties, they readily perceived that the general scheme of taxation could not apply to the mortgages of these railroad companies.

In seeking a way out, in endeavoring to devise a plan which would at once carry out the wishes of the people as to taxing mortgages without producing double taxation, and would still be applicable to the immense property of these railroad corporations, the convention had its attention called to the fact—a fact of public notoriety, spread upon the records of every county in the State—that the mortgages given by these companies contained a covenant that the mortgagors themselves should pay all taxes imposed upon the property mortgaged, and discharge every lien or burden thereon that might have priority of the mortgage. In this covenant was found a ready solution of the difficulty. In the light of its obligations, it was perfectly apparent that the assessing of the mortgage separately to the mortgagee and the residuary interest in the land merely to the mortgagor would be an idle ceremony, and would accomplish none of the objects which the convention had in view. It would not have the effect of imposing a tax upon the mortgagee, since by virtue of the covenant he could always make the mortgagor pay the tax. And as to the companies, it could not, for the same reason, lighten their burden of taxation. Since they were under obligation to pay the whole tax,—as well that imposed upon

IN THE RAILROAD TAX CASES

the interest represented by the mortgage as that upon the residuary interest,—it could be productive of no conceivable benefit to them to have these two interests assessed separately, and of no conceivable injury to have them assessed in lump. The result, in the end, upon the amount of taxes they should pay would be the same. In both cases their burden of taxation would be the same. The convention therefore resolved that the mortgages of these companies should not be assessed; that their property should be assessed as a unit, while the property of other persons was assessed in fractions—part to the mortgagor, part to the mortgagee.

Thus the Constitution classified mortgages for purposes of taxation, subjecting one class to taxation and exempting the other,—subjecting to taxation that class in which the mortgagee might be bound to pay the tax, and exempting from taxation that in which the mortgagee was, by the very terms of the mortgage, placed beyond the reach of taxation. The scope and object of its provisions will be at once apparent if, according to ancient practice, we place together in the shape of a preamble the law and the reason of the law, thus:—

“Whereas it is desirable that the lenders of money upon mortgages should pay taxes upon the value of their mortgages: therefore, be it enacted, that a mortgage shall be deemed and treated, for purposes of assessment, as an interest in the property affected thereby, and the value thereof shall be assessed to

ARGUMENT

the mortgagee, and the value of the residue only shall be assessed to the owner of the property. But whereas the mortgages of railroad and other quasi-public corporations contain a covenant by which the mortgagor is obligated to pay the tax upon the whole property mortgaged; and whereas, in view of this covenant, it would be idle to assess the mortgage interest to the mortgagee, for that interest being an interest in the property mortgaged, the mortgagor is bound by the terms of the covenant to pay the taxes thereon; and whereas, since the mortgagor is bound to pay the taxes upon the whole property, nothing would be accomplished in the end by assessing any part of it to the mortgagee: therefore, be it enacted, that in the case of mortgages of railroad and other quasi-public corporations, the whole property shall be assessed to the mortgagor, and the mortgagee shall not be assessed at all."

Thus were railroad mortgages classified. For these reasons they were withdrawn from the system of taxation applicable to ordinary mortgages. It is submitted that the reasons are proper and the classification valid.

The answer given by the defendant to these views is, that the covenant in the mortgage has not the meaning which I ascribe to it. In other words, it affirms that, under the Constitution and laws of California, if a mortgage were assessed to the mortgagee, the mortgagor would not be obligated to pay the tax thereon, though the mortgage contained this covenant.

IN THE RAILROAD TAX CASES

This is a question of the effect of the Constitution and laws of California, and is expressly decided against the contention of the defendant by the decision of the Supreme Court of that State, in Beckman vs. Skaggs.* That decision settles the law of California precisely as I contend it to be.

Upon the ground of classification, then, whether of railroad property or of mortgages, the system of taxation applied in California to railroads is, it is submitted, entirely legitimate and constitutional.

The case of the plaintiff in error, so far as any Federal question is concerned, might well rest here. But it may not be amiss to say a few words touching some further positions assumed by the defendant.

The shield behind which it attacks the Constitution and laws of California is the Fourteenth Amendment. It argues that that amendment guarantees to every person within the jurisdiction of the State the equal protection of the laws; that a corporation is a person; that, therefore, it must receive the same protection as that accorded to all other persons in like circumstances. The special argument advanced is, that if an individual owns property, and a corporation owns precisely the same kind of property, the law protects them both equally in the use and enjoyment of that property; and for the protection it affords the corporation the Government can demand no greater or different return in

* 59 Cal. 541.

ARGUMENT

the shape of taxes than it demands from the individual.

That argument I beg leave to controvert. I venture to affirm in broad terms that a State may demand taxes from a corporation when, under the same circumstances, it asks none from an individual. To illustrate: The Constitution of California authorizes a tax on incomes. No one denies the power to impose and collect such a tax. The rule of equality contended for by the defendant would compel the State, if it taxed the income of any corporation, to tax as well the income of all individuals similarly derived; for, if both the corporation and the individual are entitled to the equal protection of the law, the State cannot tax the corporation while exempting the individual as to things which are essentially the same—income from the same source.

But the taxing system of many of the States shows that the practice has been the other way. Among these may be numbered Delaware, Massachusetts, North Carolina, Pennsylvania, Rhode Island, and Tennessee.* In all these States a tax

* In Delaware, it is provided, "that all railroad and canal companies incorporated under the laws of the State," etc., shall pay "a tax of ten per centum upon the net earnings or income received . . . during the preceding year." (Rev. Codes, 1874, p. 41.)

No provision is made for taxing incomes derived from railroads or canals owned by private persons.

In Massachusetts, "the Tax Commissioner shall . . . ascertain and determine the net profits or gains of each *corporation* from

IN THE RAILROAD TAX CASES

is imposed upon the income of corporations when, under the same circumstances, none is imposed upon that of individuals.

It may be contended here—indeed, it was so urged in the court below—that in the matter of the equal protection guaranteed to corporations by the Fourteenth Amendment a distinction must be drawn between property and income; that while no discriminating tax can be levied upon the property of the corporation, it may be so levied upon its income; that while you may discriminate between the income of the corporation and that of the individual, though it be derived from the same property, yet the property itself must be taxed alike.

But I submit that if the State may legitimately lay a tax upon the income of a corporation whilst it lays none upon that of the individual derived from the same property, so may it legitimately lay a tax upon the property itself of the corporation whilst it imposes none upon that of the individual. If the rule of equality demands that the property be taxed alike, it clearly cannot permit the income from the property to be taxed differently. If the State may

which a report is required . . . and shall assess a tax of four per cent. upon the amount thereof." (Pub. Stats. 1882, p. 140, sec. 45.)

In North Carolina, express and telegraph *companies* pay two per cent. on their gross earnings. (Battle's Revision, 1873, p. 783, sec. 93.)

In Pennsylvania, each railroad, canal, and transportation *company* "shall pay a tax of three fourths of one per cent. upon the

ARGUMENT

make one kind of discrimination, it clearly can the other. What a mockery would that law be which, while pretending to discharge the duty of equal protection to the farms of A and B, should lay a tax of ten per cent. or fifty per cent. upon the income which A derives from his farm and none upon that which B derives from his!

To my mind, the fallacy, if I may be permitted so to term it, of the argument lies in the assumption that corporations are entitled to be governed by the laws that are applicable to natural persons. This, it is said, results from the fact that corporations are persons, and that the last clause of the Fourteenth Amendment refers to all persons without distinction.

The defendant has been at pains to show that corporations are persons, and that being such they are entitled to the protection of the Fourteenth Amendment. There was scarcely need of the array of learning and elaborate disquisition which has

gross receipts of said company.” (Brightly’s Purdon’s Dig., p. 1384, sec. 161.)

In Rhode Island, telegraph and telephone companies pay one per cent. of their gross receipts, “which sum shall be in lieu of all other taxes upon its lines and personal property.” (Pub. Stats., p. 84, sec. 10.)

In Tennessee, “each railroad company and every other *incorporated* company except charitable and religious, doing business in this State, shall pay into the treasury of the State six mills on the dollar on the amount of the net earnings of such railroad company,” etc. (Stats. 1871, sec. 553, subd. 67.)

IN THE RAILROAD TAX CASES

been displayed on this point. Of course, corporations are persons, and, of course, they are protected by the Fourteenth Amendment. No one, I presume, has ever doubted it. The question is, Does that amendment place corporations upon a footing of equality with individuals?

Blackstone says: "Persons also are divided by the law into either natural persons or artificial. Natural persons are such as the God of nature formed us; artificial are such as are created and devised by human laws for the purposes of society and government, which are called corporations or bodies politic."* This definition suggests at once what it would seem unnecessary to dwell upon, that though a corporation is a person, it is not the same kind of person as a human being, and need not of necessity — nay, in the very nature of things, cannot — enjoy all the rights of such or be governed by the same laws. When the law says, "Any person being of sound mind and of the age of discretion may make a will, or "any person having arrived at the age of majority may marry," I presume the most ardent advocate of equality of protection would hardly contend that corporations must enjoy the right of testamentary disposition or of contracting matrimony.

The equality between persons spoken of in the Fourteenth Amendment obviously means equality between persons of the same nature or class, and

* Book I., p. 123.

ARGUMENT

not equality between persons whose very natures are absolutely dissimilar,—equality between human beings, if the rights of natural persons are involved; equality between corporations of the same class, if the rights of artificial persons are involved. The whole history of the Fourteenth Amendment demonstrates beyond dispute that its whole scope and object was to establish equality between men,—an attainable result,—and not to establish equality between natural and artificial beings—an impossible result.

The evolution of the Fourteenth Amendment began with the first Civil Rights Bill, which provided that—

“ All persons *born* in the United States . . . are hereby declared to be citizens of the United States, and such citizens of every race and color . . . shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sue, hold, and enjoy real and personal property, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by WHITE citizens.”

That this law was intended to establish equality between men in their individual capacity, and had no reference to equality between men and corporations, is too plain for argument. The law took the rights of a white citizen as the standard of measurement, and simply commanded that the rights of all

IN THE RAILROAD TAX CASES

other citizens, whatever their race or color, should be equal to his.

After the adoption of the Fourteenth Amendment, Congress passed the second Civil Rights Bill, which gave at once legislative interpretation and enforcement to the amendment. It provides that—

“All persons within the jurisdiction of the United States shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, *give evidence*, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by *white citizens*, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to none other.”

That this again was intended to establish equality between natural persons is, to my mind, equally plain. The standard taken by the law is a white citizen and his rights and obligations. To this standard the law raises the rights, and by it measures the obligations, of all persons within the State or Territory.

Could Congress have by any possibility meant to confer upon artificial persons the same rights in the respects enumerated as were enjoyed by white citizens? Could it, for instance, have meant that a corporation should have the same right to “*give evidence*” as a white citizen? And as to contracts, may not the State which creates corporations impose certain limitations upon their right or power to make

ARGUMENT

contracts? Because the right of a white citizen to make a contract extends to all things not forbidden by law, must the right of a corporation be coextensive with it? Under this leveling statute was it intended to abolish the right of a State to impose terms and limits upon its own creatures?

Again, as to burdens: The statute says that the taxes, licenses, and exactions of every kind, and none other, which are demanded from white citizens shall be demanded from all persons within the State or Territory. Here the burden to which a white citizen is subjected is the standard of measurement. To justify a tax, license, or exaction, it must first be shown that it is demanded from white citizens. If it is not, it cannot be demanded from any other person within the State. Was this meant to apply to corporations? Was it intended that corporations should be subjected to no tax, license, or exaction that was not imposed upon white citizens, "any law or statute . . . to the contrary notwithstanding"?

It is certain that this law has never been so understood or interpreted by any State. And if it is now so to be interpreted, what, I ask, is to become of the vast mass of legislation in all the States by which taxes, licenses, and exactions are demanded from corporations where none whatever is demanded from white citizens? To take a single illustration: By a statute of Massachusetts every savings-bank incorporated under the laws of the commonwealth pays a tax of one and one half per cent. on its

IN THE RAILROAD TAX CASES

deposits. No such tax is imposed upon any individual or white citizen. This Court has held that this was a tax on the corporation—the person. It said: “The subject-matter to be taxed is the corporation, and the average amount of deposits within the period named furnishes the basis of computing the amount.” If the corporation is, under this law, to be subjected to such taxes as are imposed upon white citizens, *and none other*, how could this tax in Massachusetts be upheld?

That the Fourteenth Amendment was intended to secure equality between persons which, in the nature of things, were equal, and not between one class of persons and another class entirely dissimilar, seems so plain that the defendant itself is at times compelled to admit it. As good a definition as I could desire of the meaning of the words “equal protection of the law,” I find in the arguments formerly delivered here in the San Mateo case by the learned gentlemen opposite.

Mr. Sanderson there says: “I believe that the clause in relation to equal protection means the same thing as the plain and simple yet sublime words found in our Declaration of Independence, ‘all men are created equal.’ Not equal in physical or mental power, not equal in fortune or social position, but equal before the law.” Mr. Edmunds, speaking on the same occasion of this amendment, said that it was a “broad and catholic provision for universal security, resting upon citizenship as it

ARGUMENT

regarded political rights, and resting upon humanity as it regarded private rights."

To these lofty sentiments I beg leave to give my humble concurrence. To these, as correct statements of the broad meaning and generous scope of the Fourteenth Amendment, I yield my fullest assent. Standing in this presence, I would not attempt to dwarf the proportions of that historic provision by seeking to restrict its beneficent operation to a particular class or race. No. The law is as broad as humanity itself. Wherever man is found within the confines of this Union, whatever his race, religion, or color, be he Caucasian, African, or Mongolian, be he Christian, infidel, or idolater, be he white, black, or copper-colored, he may take shelter under this great law as under a shield against individual oppression in any form, individual injustice in any shape. It is a protection to all men because they are men, members of the same great family, children of the same omnipotent Creator. In its comprehensive words I find written by the hand of a nation of sixty millions in the firmament of imperishable law the sentiment uttered more than a hundred years ago by the philosopher of Geneva, and re-echoed in this country by the authors of the Declaration of the Thirteen Colonies, proclaiming to the world the equality of man. And realizing the dream of the poet, the philosopher, and the philanthropist, it may be that this great statute is destined to usher in the dawn of that era

IN THE RAILROAD TAX CASES

when national antipathies and animosities shall be appeased, national boundaries and barriers obliterated, and, under a system of universal justice, man shall be allowed to claim from man, in all climes and in all countries, equal protection, equal security, and equal rights.

What, then, must a State of this Union do in order to bear its share in carrying out the behests of this great commandment, that all men shall be equal—shall receive the equal protection of the laws? The State must see to it that no man, no class, no order of men are granted privileges, immunities, distinctions which are denied upon the same terms to others; that no rank or superiority is accessible to one which is not upon equal conditions within the reach of all; that no badge of invidious discrimination or humiliating inferiority is affixed to any, the humblest member of the commonwealth. The State must see to it that the avenues leading to happiness are left equally open to all; that whatever pursuit is lawful for one is lawful equally for all; that whatever hopes, aspirations, ambitions are licit for the most exalted shall be equally licit for the most humble; that into whatever paths leading to profit, place, or honor one man may venture to tread, all may upon an equal footing venture. To attain and accomplish all these ends in all the States is, I conceive, in some degree, the object of the Fourteenth Amendment. Its mission was to raise the humble, the down-trodden, and the oppressed

ARGUMENT

to the level of the most exalted upon the broad plane of humanity,—to make man the equal of man; but not to make the creature of the State—the bodiless, soulless, and mystic being called a corporation —the equal of the creature of God.

It is said on the other side that a corporation is composed of human beings; that these do not cease to be such by becoming members of the corporation; that they still continue, therefore, to be entitled as before to the equal protection of the laws.

I answer that by the very act of incorporation these human beings receive rights, immunities, privileges which form a part of the sovereign attributes of the State, and which are not enjoyed by any man in his individual capacity. By the very act of incorporation the equality between the corporate body—the group of corporate members, if you please—and isolated individuals is effectually destroyed. To enumerate no other, the State may grant to the corporation the right of eminent domain—a right which is possessed by no individual in the State. They—the corporation, or, if you please, the group of corporate members—take these discriminating privileges in their corporate capacity, asserting, and properly, that the equality between men is not thereby destroyed because the privileges are granted to the corporation and not to the individual; and yet, when it comes to discriminating burdens imposed upon the corporation,—or, if you please, the group of corporate members,—they

IN THE RAILROAD TAX CASES

claim that the burdens are imposed upon the individuals, and not upon the corporation. I cannot conceive the reasoning by which a corporation is treated as a unit for the purpose of absorbing privileges which the sovereign grants, but must be looked upon as disintegrated into its component parts for the purpose of bearing burdens which the sovereign imposes.

Therefore, I venture to repeat that the Fourteenth Amendment does not command equality between human beings and corporations; that the State need not subject corporations to the same laws which govern natural persons; that it may, without infringing the rule of equality, confer upon corporations rights, privileges, and immunities which are not enjoyed by natural persons; that it may, for the same reason, impose burdens upon a corporation, in the shape of taxation or otherwise, which are not imposed upon natural persons; that taxes, whatever shape they assume,—whether in terms levied upon property, business, or income,—are always, essentially, a charge upon persons,—a contribution required by the State from those who receive the benefits of its government; that property, business, income are mere standards to measure the liability of the person taxed;* that the rule of equality

* “The tax,” says Burroughs, “is a contribution required of its citizens by the State, and when it is measured as to its amount, by the value or the productiveness of the property, it is still a tax on the person, and there is a personal liability of the person assessed

ARGUMENT

requires only that equality shall be observed among taxables of the same class; that therefore a tax of two per cent. on the value of its property, the quantity of its business, or the amount of its income might well be imposed upon a corporation, whilst a tax of only one per cent. is imposed upon the property, business, or income of a natural person, even though the nature and character of the property, business, or income were the same.

That equal protection does not require that corporations should be governed by the same laws as natural persons, and that burdens may be imposed upon the former when under precisely similar circumstances none are imposed upon the latter, is fully illustrated by the recent decision of this Court in Missouri Pacific Railroad Company vs. Humes. The action arose under a statute of Missouri which provides that "*every railroad corporation . . . shall*

with the tax. The individual, and not his property, pays the tax. The property is resorted to for the purpose of ascertaining the amount of the tax with which the owner must be charged. The tax is imposed upon the person of the owner on account of his ownership of the property." (Burroughs on Taxation, sec. 9.)

"Reference to the average amount of deposits is made," says the Supreme Court of the United States in Providence Institution vs. Massachusetts (6 Wall., 623), "not as a description of the subject to be assessed, but as furnishing a basis of computing the amount of the tax to be paid by the corporation. The subject matter to be taxed is the corporation, and the average amount of the deposits within the period named furnishes the basis of computing the amount."

IN THE RAILROAD TAX CASES

erect and maintain lawful fences on the sides of the road, . . . and until fences . . . shall be made and maintained, such *corporation* shall be liable in double the amount of all damages" done by it to animals on the road. The plaintiff's mule having been killed on defendant's road by reason of the corporation's neglect to build fences, a judgment in double the amount of its value was rendered in the court below. The defendant was a railroad corporation. On error it was urged that this statute deprived the defendant of the equal protection of the laws.

I have no access to the arguments, but I presume the contention was identical with that of the defendant in the case at bar, namely,—that a corporation was a person, and entitled to immunity from all burdens which were not under similar circumstances imposed upon natural persons; that the statute imposed a penalty upon corporations where for the same identical trespass it imposed none upon an individual; that if an individual owned a railroad, and through his neglect to build fences an animal was killed, he was not subjected to double damages, but under identically the same circumstances a corporation was so subjected; that this, therefore, was an injurious discrimination against corporations. But this Court, speaking through Mr. Justice Field, said:—

"The objection that the statute of Missouri violates the clause of the Fourteenth Amendment,

ARGUMENT

which prohibits a State to deny to any person within its jurisdiction the equal protection of the laws, is as untenable as that which we have considered. The statute makes no discrimination against any railroad company in its requirements. Each company is subject to the same liability, and from each the same security, by the erection of fences, gates, and cattle-guards, is exacted, when its road passes through, along, or adjoining inclosed or cultivated fields or uninclosed lands. There is no evasion of the rule of equality where all *companies* are subjected to the same duties and liabilities under similar circumstances. See, on this point, *Barbier vs. Connolly*, 113 U. S. 27, and *Soon Hing vs. Crowley*, *Id.* 703."

I have hitherto argued this cause upon the assumption that the State has the right to subject railroad property or the property of a railroad corporation to a system of taxation which may be more burdensome than that applicable to private property. I have endeavored to show that such a discrimination would be entirely justifiable. I shall now strive to demonstrate that under the Constitution and laws of California applicable to the condition of the defendant here there is no such discrimination.

It is assumed in the judgment rendered here that the revenue system of California does make such a discrimination, and thereby works great injustice upon railroad corporations, from the asserted fact that under it they are made to bear a heavier load



IN THE RAILROAD TAX CASES

of the public burdens than they would if assessed as individuals are. It is affirmed by counsel for defendant that to injure these corporations was the mainspring of these provisions. It is said in the opinion rendered here:—

"The railroad companies in California are taxed yearly to an amount exceeding six hundred thousand dollars. Their property is heavily encumbered with mortgages amounting to much more than its value. Why should they not be allowed by law, if they pay this sum, to credit it on their mortgages, as any natural person paying it would be allowed? Why should this unjust discrimination be made against them? Why should they, by law, be denied a credit for this more than six hundred thousand dollars a year? Is there any justice in this denial? . . . Why, then, should not this system be pursued? The State would then collect all the taxes which it ought to collect; the tax being a lien upon the property could be enforced by a sale of the property, just as though it was levied on the property, and not upon the mortgages. *If the companies should then pay the tax, they could by law claim credit for it on their mortgages, and it would be deducted in the payment of the interest or principal of the bonds.* Then justice would be done to the corporations, as it is done to individuals."*

The whole point of this asserted discrimination and injustice lies in the assumption that if railroads were assessed as other property is the mortgagees

* Record, pp. 112, 113.

ARGUMENT

would be bound to pay the tax on the mortgage interest; and if, to protect itself, the company paid it, it would be entitled to recover it from the mortgagees, or to a credit for it upon the mortgage debt. The injustice charged against the Constitution of California "hath this extent, no more." If, therefore, it shall be shown that if the property of this corporation were assessed as that of private individuals is assessed the corporation would still be compelled to pay the tax on the mortgage interest,—if it shall be made manifest that in this case, were the mortgage interest assessed to the mortgagees, the corporation and not the mortgagees would have to pay the tax on that interest,—if it shall be demonstrated that, were the mortgage interest assessed to the mortgagees and the corporation paid the tax thereon, it never could recover the amount of that tax back from the mortgagees, nor get credit for it on its debt, then will these charges of wrong fall to the ground, these phantoms of injustice vanish. That this demonstration can be made is, to my mind, plain.

Upon the face of the mortgage in this case is the covenant to which I have already alluded. Under that covenant, as I have shown, the mortgagor is bound under the laws of California to pay the taxes levied upon the mortgage interest. Under those laws, if the mortgage interest was assessed to the mortgagee, and he paid the tax, he would be entitled to recover from the mortgagor the amount so paid. And this, as I have shown, is authorita-

IN THE RAILROAD TAX CASES

tively settled by the decision of the Supreme Court of California.*

The Circuit Court, however, in the case at bar, without referring to this decision, held that under the laws of California the covenant in question would not have the operation given it by the Supreme Court of that State. But it is submitted that the decision of the highest judicial tribunal of a State upon a question of the meaning or operation of its own Constitution and laws, where no rights arising under the Constitution, treaties, or laws of the United States are involved, is binding upon the Federal Courts.

I have now done. I am conscious of having occupied no inconsiderable portion of the time allotted by the Court for the argument,—not longer, I hope, however, than the importance of the questions at issue warrants. In saying this I am not unmindful of the propensity of counsel to magnify their causes. Self-complacency is ever ready to whisper exaggerated notions of the magnitude of our undertakings. Yet I cannot but think that the controversy now debated before your Honors is one of no ordinary importance. It is important to the people of California, not only on account of the very large amount at stake, but more, for that it involves the validity of their laws and Constitution. It is important to the many States whose revenue systems, similar to that of California, are menaced by the

* Beckman vs. Skaggs, 59 Cal. 541.

ARGUMENT

same attack. It is important to every State of this Union whose sovereign attribute of taxation is here challenged.

That your Honors may now take the questions discussed from the region of controversy in which they have been agitated for the last six years and place them in the realm of fixed law, these cases are now submitted for decision.

POLITICAL

THE following speech was delivered in the city of Santa Cruz on the evening of Monday, November 5, 1900,—the day before the Presidential election.

SPEECH AT SANTA CRUZ

MR. CHAIRMAN, LADIES AND GENTLEMEN: No one familiar with current events can fail to perceive that the public mind throughout the United States is undergoing to-day an unwonted agitation. The mere fact that we are in the midst of a Presidential campaign is inadequate to account for this condition. The people realize that questions of far greater magnitude than those usually discussed in such contests are presented for solution. The issue is not, as of old, what particular lines of policy upon matters of finance, commerce, or internal government shall be pursued. It is, rather, whether the republic itself shall continue to exist,—whether the fundamental principles upon which the Government was originally established and the cardinal rules of policy by which it has been successfully built up for more than a century are now to be abandoned,—whether instead of continuing to be hereafter, as we hitherto have been, the lofty ideal of the self-governing peoples of the world, we shall turn our back upon the teachings and achievements of the past, and acknowledging that the government of the people,

SPEECH

by the people, for the people is a failure, become henceforth proselytes of the doctrines and imitators of the policies of the monarchies of Europe.

The question is, Shall our Government be a government of justice or of injustice, of liberty or of tyranny, of equality or of despotism,—in one word, shall it be a republican government or an imperial oligarchy?

Nearly two and a half years ago,—on the 25th of May, 1898, or when the sound of Dewey's victorious cannon in Manila Bay had scarce yet died upon our ears,—in a thoughtful address to the graduating class of Stanford University, President Jordan said:—

“ We have followed the spirit of Washington’s address for a hundred years, until the movement of history has brought us to the parting of the ways. Federalism or imperialism — which shall it be? Let ours be sober, fearless, prayerful choice. The federal republic—the imperial republic—which shall it be?”

About two years afterward,—on the 17th of last April,—George F. Hoar, of Massachusetts, speaking from his place in the Senate in opposition to the imperialistic policy to which the Republican party had committed itself, said:—

“ I believe, Mr. President, that perseverance in this policy will be the abandonment of the principles upon which our Government is founded; that it will change our republic into an empire; that our methods of legislation, of diplomacy, of

AT SANTA CRUZ

administration must hereafter be those which belong to empires, and not those which belong to republics.

"Whether the inestimable and imperishable principles of human liberty are to be trampled down by the American republic, and whether its great bulwark and fortress, the American Constitution, impregnable from without, is to be betrayed from within, is our question now."

The importance of this issue is best stated in the language which Senator Hoar used in the same speech, when he said:—

"I do not underrate the importance of this issue: it is greater than parties, greater than administrations, greater than the happiness or prosperity of a single generation."

Whether put, then, in the words of President Jordan or of Senator Hoar, the question presented to the American people to-day is ever the same. It is, "whether we will change our republic into an empire," whether "our methods of legislation, of diplomacy, of administration must hereafter be those which belong to empires, and not those which belong to republics," and, in fine, "whether the inestimable and imperishable principles of human liberty are to be trampled down by the American republic, and whether its great bulwark and fortress, the American Constitution, impregnable from without, is to be betrayed from within."

This, then, is the question. And, to quote once

SPEECH

more from Senator Hoar, it “is our question *now.*” It is at our door. It will brook no delay. It must be answered, and answered now. All history teaches that the course of tyranny once begun is ever onward. It never takes a step backward. If it pauses, it is only when it reaches the precipice or is overwhelmed in the abyss of revolution. Four years from now the supporters and beneficiaries of imperialism will be intrenched behind such bulwarks of wealth, patronage, and power, and defended by such retainers, as to laugh to scorn all constitutional efforts to dislodge or even disturb them. They will be permanently enthroned. The outward form of a republic may still for a while be maintained; but the spirit of the Constitution will be dead, and the sublime truth of the Declaration of Independence, that all men are created equal, will have become the butt of jesters, and the laughing-stock of buffoons.

Since, then, all wisdom and experience teach that our choice must be made, and made now, let us, like brave men, look our responsibility calmly in the face. In the language of President Jordan, “let ours be sober, fearless, prayerful choice.” Called upon to abandon the old for the new, invited to discard tried and approved principles and policies of government for novel and untried experiments, let us calculate the prospect of bettering our condition by the change. To that end, let us first examine how we have fared under the ancient system.

AT SANTA CRUZ

Not so very many years ago, if time be measured by national existence, the Fathers established a government upon principles as yet untried in political science—principles whose operation was looked upon with secret anxiety by friends and open derision by enemies. One hundred and eleven years have elapsed; and now the result of the experiment is open to the contemplation of the world. The republic, built upon those principles and reared aloft in accordance with the maxims of the policy to which they gave rise, still stands,—stands, silencing by its achievements the doubts of the incredulous and exceeding the hopes of the well-wishers,—stands, eclipsing the most renowned governments of ancient and of modern times,—stands in its unity, its grandeur, and its might, crowned with the double diadem of liberty and equality.

The world beholds what has been done in little more than a century of national life. The territory of the original thirteen States, stretched at first like a slender rim along the Atlantic seaboard, having by gradual and legitimate expansion reached the natural limitations of the Gulf and the Rio Grande on the south and the waters of the Pacific on the west, comprises now within its confines a continuous and unbroken area within the temperate zone, with which the vast empire of Rome in the zenith of its splendor is not to be compared. The population, in little more than a century, has been multiplied

SPEECH

over twenty-fold, until now its inhabitants surpass the amazing figure of seventy-five millions. Civilization and the arts of peace have gone hand in hand with increasing numbers and territorial expansion. In agriculture the nation stands easily in the lead. Commerce, starting at first from slender beginnings, but acquiring power with each revolving year, distances to-day that of hitherto unrivaled England herself. Manufactures, drawing their materials from the cotton-fields of the South, the deposits of coal, iron, and copper of the Middle West and the Northwest, and the gold and silver mines of the Pacific Slope, take the first place in the world's contest for supremacy, supplying the globe with the products of their looms, their furnaces, and their mills, furnishing with equal facility and profusion textile fabrics to the inhabitants of the Orient, ships of war to the Mikado, rails and locomotives to the ironways of the Great White Czar. Education keeps pace with the march of territorial, agricultural, commercial, and manufacturing progress. In every hamlet a schoolhouse, in every town a college, and in the more favored centers of population those wonderful institutions of higher learning which, though of recent growth, challenge comparison with the famed universities of the Old World—with Bonn and Göttingen and Heidelberg, with Cambridge and with Oxford—and place at the head of the most advanced educational movement Yale and Harvard, Cornell, Princeton, and Hopkins,—

AT SANTA CRUZ

aye, and the giant twin brothers of the West, our own Berkeley and Palo Alto. But beyond and above all, this nation of seventy-five millions of people, after passing through the varied vicissitudes, political strifes, and armed conflicts of the first century of its existence, is still united, homogeneous and free, speaking the same language, worshiping the same God, pursuing the same ideals of private and public excellence, governed in its national concerns by a uniform legislation, enjoying the blessings of a liberal Constitution, and dispensing justice under wise and impartial laws,—so strong, so resourceful withal, as to daunt the thought of attack from without, and be secure against all dangers from within—all, save the perils of degeneracy—the decay which comes from the abandonment of lofty ideals, from the pursuit of groveling and low desires, from the desertion of the shrine of Liberty to worship in the temple of Mammon.

Why have I thus gone over the glorious achievements of the past? Simply to lead to the question, To what are these achievements due? and to answer, To the principles upon which our Government was founded and to the rules of policy according to which its edifice has been reared. Before we yield, then, to the invitation to change, let us make sure that we fully appreciate what we are called upon to abandon, and know what were those principles and what those rules of policy.

SPEECH

The one basic principle upon which the Fathers established our Government is found in the simple but sublime utterance of the Declaration of Independence that "all men are created equal." From this flow, as corollaries, these other principles,—that all men are created free; that the consent of the governed is the only lawful source of the powers of government; that the State recognizes equal rights in all and special privileges in none.

The essential and all-pervading idea of the policy inculcated by the Fathers is found in that sentence of Washington's Farewell Address in which he inculcated upon the mind of the people that our true prosperity must ever be built upon a basis of exalted justice. Allied to this one idea are the other truths of that immortal legacy,—that the maxim that honesty is the best policy is no less applicable to public than to private affairs; that the public faith must be sacredly preserved and public engagements faithfully carried out; that our commerce should be diffused and diversified by gentle means, but never by force; that the Constitution should be sacredly maintained; that we should avoid standing armies, as force is the vital principle and immediate parent of despotism.

These are the fundamental principles of government, these the essential rules of internal and external policy, which, since the days of Washington and Jefferson, have been the pole-star under whose guidance our prosperity and happiness at home have

AT SANTA CRUZ

been secured, our commerce diversified and extended, and our relations abroad safely and honorably maintained. These are the tenets common alike to the Republican and the Democratic faith—tenets so unquestioningly assented to heretofore by all as to have become interwoven with the very fabric of our national existence, and to constitute the truisms of our political science. By fidelity to their teachings we have achieved the results which the world beholds with amazement, and occupy to-day the position of the most enlightened, the wealthiest, and the mightiest nation of the globe. Before we abandon them, before we abjure our ancient creed to kneel at the altar of new divinities, it behooves us to inquire what we are to receive in exchange.

What is offered as a substitute? Imperialism. What is imperialism? The term is new in our political discussions. It has a strange sound to American ears. I venture to give you the idea which it conveys to me. By imperialism I understand, broadly, a government so constituted and administered that the people are governed for the benefit of a privileged class; a government in which a few individuals, having possession and control of the government machinery, work it for their own exclusive advantage; a government in which the mass of the people are made to bear the burdens of the state, and a select aristocracy of rank or plutocracy of wealth reap the benefits, honors, and

SPEECH

advantages. It matters not what external form this government may assume. I care not whether it presents itself in the garb of a polite and refined monarchy, as it did in France during the epoch which preceded the great Revolution,—in the days when the nobility, while owning all the land, filling all the offices, and endowed with all the honors of the realm, enjoyed immunity from taxation, and threw all the burdens of government upon a wretched, famished, and despairing peasantry. I care not whether it assumes the brutal mien of an undisguised, avowed, and forthright despotism, as it did under the dominion of the Romanoffs, when the ukase of the Czar was the sole law of Russia. I care not whether, while abridging the rights of the people at home and extending the privileges of a favored class by accessions abroad, it observes the external ceremonials of a republic and masquerades with decorous mien in the robes of liberty. Of these non-essentials I take no note. If the government is so devised and operated as to work the oppression of the people for the benefit of a class, it is imperialism, disguise it as you may.

And now I ask, Does the Government, as administered by the Republican party, judged by its actions in the past and its declared purposes for the future, fairly fall within this definition of imperialism?

Neither my strength nor your patience would permit my dwelling upon all the *indicia* by which this gangrene of imperialism is manifested in the

AT SANTA CRUZ

Republican party to-day. I must of necessity confine myself for the present to one only of the most palpable, decisive, and fatal. I allude, of course, to the attitude which that party has assumed, and which it declares it is its purpose to continue to assume, toward the territory affected by our late treaty with Spain.

Let us at the outset settle one question: Does the Republican party intend to retain the Philippines as a colony outside the pale of the Constitution, without the rights of a Territory or the hope of future statehood, to be governed at will by the President or the Congress?

Upon this there is no room for doubt. In his last annual message, discussing this question, President McKinley said:—

“The islands lie under the shelter of our flag. They are ours by every title of law and equity.”

The attitude of the Republican party toward these islands is very frankly avowed, and boldly set forth in an article published in the September number of the *North American Review*, in which it is said:—

“The statesmanship of our land might well develop its ripest fruits in the solution of our colonial problems. We must remember the temptations which may from time to time lure American statesmen, in search of votes in the United States Senate, to advocating the creation of alien states. A perpetual constitutional barrier must be erected against

SPEECH

the statehood of all non-contiguous possessions. We must constitute an American colonial system."

It may, then, be considered thoroughly settled—indeed, no one denies it to-day—that it is the purpose of the Republican party to retain the Philippine Islands subject to the perpetual dominion of the United States, to be governed as a colony at the will of the President or the Congress.

The same, of course, is confessedly true of Porto Rico, since, by imposing a tariff upon both its exports and imports, a Republican Congress and a Republican President deal with it as a subject possession outside the Constitution, and entitled to no rights of a Territory of the United States.

And, now, let me address a question to the Republican party: What are your intentions toward Cuba? You have pledged the honor of the American people to give that much-vexed island its independence. Do you intend to redeem that pledge? I never have believed that you did, and do not now. I believe that when you declared war against Spain your pretense of outraged humanity and sympathy for a people striving for independence was mere cant. I believe you cared as little then for the sufferings of the *reconcentrados* under Weyler as you do to-day for the fate of the starving millions of India. I believe that you looked with as much contemptuous derision upon the warfare of Garcia's bands of insurgents to achieve their independence as you have since

AT SANTA CRUZ

beheld with indifference the pathetic struggle of the heroic soldiers of Joubert and Oom Paul to retain theirs. I believe that throughout this bad business you have had from the start two objects in view,—the first to gain political capital by declaring and carrying on the war, and the second to obtain and keep possession of Cuba. I believe that all your past efforts and present maneuverings are directed to execute there a scheme of annexation similiar to that by which Texas was lost to Mexico and the Hawaiian Islands have been filched from the descendants of the Kamehamehas. I believe that, under one plea or another,—of military necessity, or of alleged incapacity for self-government, or of pretexted incompetency to enjoy the blessings of independence,—you will, if permitted, prolong your stay until that object is accomplished. This has been my belief from the beginning. It is my belief now. That belief is based upon my estimate of the present Administration, and of the character, interests, and purposes of the men who shape its ends. Do I wrong them?

In the Senate of the United States, as late as the 23d of May of this year, Senator Hale, of Maine, a Republican of undisputed prominence and long service, answering Senator Spooner, of Wisconsin, one of the acknowledged supporters of President McKinley, said :—

“ Now, let me say to the Senator I think there are very powerful influences in this country; I think they

SPEECH

are largely located in New York City; I think they are largely speculative and connected with money-making enterprises, that are determined that we shall never give up Cuba. I think there is a dangerous cloud in the sky; I think the time will never come, unless something earnest and drastic is done by Congress, when the last soldier of the United States will be withdrawn from Cuban soil.

"I discover very powerful influences—commercial, mercantile, money influences, and political influences—that are opposed to our ever withdrawing from Cuba."

In a speech lately delivered in Chicago, the junior Senator from Indiana, Albert A. Beveridge, made the following significant declaration :—

"I am speaking for myself alone; but speaking thus, I say that separate government over Cuba, uncontrolled by the American republic, never should have been promised. The resolution, hastily passed by all parties in Congress, at an excited hour, was an error. I speak for myself alone; but speaking thus, I say that it will be an evil day for Cuba when the Stars and Stripes come down from Moro Castle."

It may, therefore, be set down for a certainty that, as it is the avowed intention of the Republican party to keep the Philippines forever, so it is their but half-disguised purpose to impose the same fate upon Cuba.

And now the question may fairly be asked : What is there in all this that indicates an abandonment of

AT SANTA CRUZ

the principles and policy of the Fathers? What evidence of imperialism is involved in the retention of these former Spanish possessions as colonies of the United States? How would that be an act of government for the benefit of a class to the detriment of the people? To that question I shall endeavor to give a categorical, though the limitations of the hour do not allow a complete, answer.

Before doing so, however, it may be well to dispose of one argument by which a certain class of Republican orators fancy they silence all further discussion. They appeal to the deep-seated reverence for the flag. They argue—and, of course, truly—that to maintain the honor of our national emblem is a matter which concerns the whole people. They then declare with clamorous fervor that wherever that flag has been raised by the valor and blood of our sons, there it must remain forever. The latest utterance upon this subject was that of an orator in San Francisco, who, some nights ago, said :—

“ McKinley enlarged this nation and maintained its flag in distant lands, where fate and valor planted it, and boldly and confidently asks, ‘Who will haul it down?’ ”

This sounds well. And yet it takes no great reflection to realize that it is a mere trick of speech—a transparent jugglery of words. If it is meant that wherever the victorious arms of American soldiers have planted their country’s flag, there they

SPEECH

will defend it against hostile assault, and that every citizen is concerned in having it so defended, the sentiment is legitimate and proper. But, in that sense, the sentiment itself finds no room for application. What these perfervid orators mean to be understood to say is, that wherever, in time of war, the flag has been unfurled, it involves national dishonor for the people, in time of peace, voluntarily to haul it down. In this sense the sentiment is obviously false and childish. It finds a most fitting rebuke in the speech of the venerable Senator from Massachusetts already quoted from, where he says :—

“ Is there any man so bold as to utter in seriousness the assertion that where the American flag has once been raised it shall never be hauled down ? I have heard it said that to haul down or to propose to haul down this national emblem where it has once floated is poltroonery. If every territory over which the flag of a country has once floated must be held, and never shall be yielded again to the nation to which it belonged, every war between great and powerful nations must be a war of extermination or a war of dishonor alike to the victor and to the vanquished. This talk that the American flag is never to be removed where it has once floated is the silliest and wildest rhetorical flourish ever uttered in the ears of an excited populace. No baby ever said anything to another baby more foolish.”

The sentiment is proven false by our history. Two years and a half ago, being in the capital of our sister republic across the Rio Grande, I stood

AT SANTA CRUZ

on a spot where, on my right hand, the gray walls and red roof of Molino del Rey, still bearing the dents made by the shells of Worth's battery, were outlined against the glowing sky of the tropical sunset, while on my left, from amid a grove of trees whose hoary heads had looked down upon the soldiers of Cortez and witnessed the heathen rites of Aztec priests in the days of Montezuma, rose the rocky and precipitous heights of Chapultepec. Memory brought me back to that September morning, fifty years before, when, at the head of a storming party, the intrepid Howard had scaled the parapet and had planted the victorious standard of his country upon the walls of the ancient Spanish vice-regal castle. But that flag was there no more. In its place, streaming in the deepening twilight, was the emblem of another republic—a republic which, though conquered by us, had yet learned to copy our Constitution, to pattern its government upon ours, and to respect and venerate our institutions. Did our national honor suffer any impairment, or were the achievements of our troops tarnished, because, in accordance with the treaty of Guadalupe Hidalgo, we had afterward hauled down our flag and given back to Mexico the territory which Scott's gallant soldiers had conquered and occupied? Did it involve dishonor voluntarily to surrender in peace what in war we had won and defended against every attack?

Let us take a more modern illustration. In the

SPEECH

late war with Spain, was not our flag raised upon other soil—and raised by the valor of our soldiers? The world beheld with wonder and admiration the deeds of that unmatchable band of warriors—each man hero, each in himself at once soldier and commander—who, under the scorching rays of a torrid sun, through the growth of a tropical jungle, and amid the hail of Spanish musketry, climbed the sides, and planted their banner upon the heights, of El Caney. If ever flag was raised by the blood and valor of our sons, that surely was. If ever dishonor comes to that flag, it will come on that day when, in violation of the plighted faith of the American people, we shall refuse to haul it down.

There are other high-sounding platitudes which form the common verbiage of a certain class of Republicans. Among these may be numbered the talk about the finger of Providence, and about our manifest destiny, and about the sacred trust confided to us, and about our duty to humanity, and about the spreading of the Gospel, and the like. I will pass by this sort of talk in silence. It does not call for serious consideration.

Brushing aside all these flourishes of a meretricious rhetoric, let us approach the question at issue: Is the retention of the Philippines an imperialistic measure? Does it involve an abandonment of the fundamental principles upon which our Government is founded, and the subversion of the essential ideas of policy according to which it has been

AT SANTA CRUZ

reared aloft? Does it entail the surrender of the great truth that all men are created equal, and the violation of the principle that our true prosperity must ever be built upon a basis of exalted justice?

The first sacrifice involved in the retention of the Philippines will be our national honor. That retention will constitute the first instance of the violation of the plighted faith of this republic. It will be the first blot upon our escutcheon.

Let me recall the circumstances under which we acquired possession of those islands—lest we forget. Nearly two and a half years ago, we declared war against Spain. The once glorious empire of Charles V. had in time become so decayed that nothing but the loftiest and purest motives could have warranted a generous nation in challenging to combat so weak an adversary. We proclaimed to the world, therefore, that we were actuated by no other motive than disinterested humanity and unselfish sympathy for a neighboring people struggling for independence; that nothing was further from our thought than the forcible acquisition of the territory of our foe; and that we would look upon such acquisition as criminal. Our utterances were explicit. The Congress declared that “the people of the island of Cuba are, and of right ought to be, free and independent”; it spurned all imputation of a “disposition or intention to exercise sovereignty, jurisdiction, or control over said island, except for the pacification thereof”; and asserted “its determination, when that was

SPEECH

accomplished, to leave the government of the island to its people." At the same time, our Chief Magistrate, in words now memorable, announced that the forcible annexation of Spanish territory would, in our code of morality, be a criminal aggression not to be thought of.

"These," says President Jordan, "were noble words, and a noble nation must live up to them. The plea that they were intended for Cuba only, and do not pledge us to a like action elsewhere, is too cowardly to permit of discussion."

If, then, after these explicit and solemn declarations, we forcibly or fraudulently retain these Spanish possessions, or either of them, we stand, by the judgment of our own Chief Magistrate, convicted of perfidy.

Is this the conduct that befits our republic? If it is, then was Washington wrong when he said in his Farewell Address that the maxim that honesty is the best policy is no less applicable to public than to private affairs; then was the solemn warning of his first inaugural, "that the propitious smiles of heaven can never be expected on a nation that disregards the eternal rules of order and right which Heaven itself has ordained," an empty sound. No, let this policy seek its justification among the tortuous maxims of kingcraft inculcated by a Machiavelli or a Talleyrand,—it can find none in those of a republic.

The next price that we must pay for the reten-

AT SANTA CRUZ

tion of the Philippines will be the sacrifice of the principles of our Government.

That the Constitution bars our way to the acquisition of colonial possessions and to the government of human beings as subjects, is a proposition so clearly established by the provisions of that instrument and the history of the conditions under which it saw the light as to admit of no debate. The framers of the Constitution had themselves been subjects of Great Britain. They had tasted of the bitterness of colonial government. For years they had suffered from the tyranny which treated them as mere chattels, governed not with a view to their own welfare, but for the aggrandizement of the mother country. In eloquent and passionate appeals they had repeatedly set forth their grievances and remonstrated against this oppression. Denied redress, they had at length resolved upon the dangerous and doubtful experiment of war. They had just emerged from the struggle which emancipated them from their colonial position and gave them independence, when they sat down to devise a scheme of government best suited to their condition. That in establishing the fundamental principles of that government it was their purpose to provide that their country should itself become the owner of colonies, and should impose upon others that tyranny to be relieved from which they had themselves paid such fearful cost of treasure, of suffering, and of blood, nobody has yet had the

SPEECH

boldness to assert. They contemplated, no doubt, that the country would in the course of time expand. They knew that its territorial extent would increase and its population be multiplied. But the only permanent territorial additions they had in view were to come through the admission of States, not colonies; the only increase of population in the shape of citizens, not subjects.

This whole matter was long ago disposed of by the Supreme Court of the United States, when it said:—

“There is certainly no power given by the Constitution of the Federal Government to establish or maintain colonies bordering on the United States or at a distance, to be ruled or governed at its own pleasure; nor to enlarge its territorial limits in any way, except by the admission of new States. No power is given to acquire a territory to be held and governed permanently in that character. It is acquired to become a State, and not to be held as a colony and governed by Congress with absolute authority. A power, therefore, in the General Government to obtain and hold colonies and dependent territories over which they might legislate without restriction, would be inconsistent with its own existence in its present form.”

The price to be paid, therefore, for the acquisition of the colonies is the Constitution itself. That price the imperialists are willing to pay. As the Constitution stands in their way, they are ready to

AT SANTA CRUZ

get rid of the Constitution. This disposition is best manifested in the language of one of them, who, some time ago, said:—

“The Constitution or national policy adopted by thirteen half-consolidated, weak, rescued colonies, glad to be able to call their lives their own, cannot be expected to hamper the greatest nation in the world.”

The Declaration of Independence itself—which has been very aptly called the spirit, while the Constitution is the letter, of our Government—has been characterized in this same quarter as “but a bit of sublimated demagogism.” We may next expect to hear these gentry declare that the Ten Commandments are but a piece of hypocritical cant.

The next price that we must pay for the retention of the Philippines will be the danger and the cost of militarism.

It is obvious that the retention of these islands will involve the necessity of maintaining a vast army and navy. To police them we must do what England has always been compelled to do in India—keep there a large body of troops. To defend them against aggressions, which the jealousy or wars of foreign nations may at any time force upon us, we must have at our command an adequate fleet. Being resolved—to use the phrase of the day—to become a world power and to adopt the gait of other powers, our pride will prompt us, and the exigencies of our position may compel us, to

SPEECH

take the lead. We have already made a very significant step in that direction. After the war with Spain had been brought to an end, Congress, in conformity with the request contained in the President's message of December, 1898, authorized the increase of our army from twenty-five thousand to one hundred thousand men. We will never rest until we have an army and navy larger and more powerful than those of any other nation of the globe.

But the expense of keeping up this armament is appalling. Do you know what the cost of Continental armies is? It is, in round numbers, one fourth of the whole revenue of the nations of the Old World. How is it with us? We have only begun. Our army and navy are yet comparatively small. But we have already shown what we can do for the present, and given some idea of what we may accomplish in the future. For the fiscal years 1897 and 1898—before the war with Spain—our average yearly appropriation was, in round numbers, four hundred and seventy-five million dollars. For the three years following—1899, 1900, 1901—our average yearly appropriation, actual and estimated, has been and is, in round numbers, seven hundred and seventy-five million dollars. The excess for each year since the war is, in round numbers, three hundred million dollars. The luxury of our army and navy, then, has already cost us, in round numbers, the enormous sum of six hundred

AT SANTA CRUZ

million dollars. There is every prospect that, as time rolls on and our armaments increase, these figures, instead of becoming smaller, will become larger.

Take the expenditures for the army alone, without regard to the navy. From dispatches dated at Washington the 8th of last month, and published in the San Francisco papers on the following day, it is made manifest that, although the Administration is strenuous in its insistence that the war in the Philippines is over and that peace has been restored, there is no intention of diminishing our present standing army. On the contrary, the Administration is determined to maintain that army permanently, upon its present footing at least. These dispatches say:—

“Secretary Root has planned to ask Congress to increase the army by seventy-five thousand men, so as to place the regular establishment on an enlisted footing of one hundred thousand men permanently. Secretary Root, it is said, deems the larger army necessary to a maintenance of American rule in the new possessions. Moreover, if the United States is to mix in foreign affairs, a larger army is an absolute necessity.”

What is the estimated cost of the army? In the same dispatches it is said:—

“Chiefs of bureaus of the War Department are estimating for expenses on the basis of an army of one hundred thousand men.”

SPEECH

After giving in detail the cost of the various departments of this army, the dispatches conclude:—

“The War Department estimates figure up nearly two hundred million dollars.”

These estimates do not, of course, include the expenses of the navy. They are a verification of a prediction made by Senator Hoar in his speech already quoted from, when he said:—

“Assuming that the War Department has asked for a sum sufficient to assume the occupation of the islands and a proper establishment for police purposes, it will be seen that there are other larger and uncertain items of cost upprovided for, and the annual appropriation will in future be nearer two hundred million dollars in excess of those of 1898 than \$155,712,751, an annual increased expenditure of two hundred million dollars.”

The next price that we must pay for the retention of the Philippines will be the race problem presented by the introduction into our body politic of ten or twelve millions of men, strangers in blood, color, language, moral habits, and modes of life—fierce and warlike men who, as long as they exist, will look upon us with the aversion, the hatred, and the desire for revenge with which an alien race ever looks upon its conqueror. Whether they come to us as citizens or as subjects, the question will always arise, What shall we do with them? The thought of amalgamation is as revolting to our nature as it would be debasing to our race. Of all

AT SANTA CRUZ

the utterances of the President upon this bad business, the most unbearable is that wherein he told these people that "The mission of this nation is one of benevolent assimilation." Assimilation! Assimilation with the native of the Malayan archipelago! Assimilation with the heathen slave-driver and the Mohammedan pirate!

Upon this subject it is to Southern men especially that I wish to address my remarks. To them I speak, for they best know. If, then, there be within the sound of my voice a Southern man who has already listened to the siren strains of imperialism, who has allowed his imagination to be dazzled by visions of wealth and aggrandizement, whose natural fealty has been disturbed by the delusions of commercialism, to him I appeal. If he contemplates the bringing among us of the black, brown, or copper-colored inhabitants of Cuba, of Porto Rico, and of the Philippines, under a process of "benevolent assimilation," to him I say: Pause before you take this fatal step. Are you ignorant of the condition of that land in which you first opened your eyes, and upon which it was the pride of your forefathers to center their affections? Do not you know what the presence of an inferior race has done to your people? Do not you know how it has hindered their prosperity and crushed their hope? Have you forgotten that radiant child of genius who lit up for a moment the splendor of the Southern sky, and then, meteor-like, sank into

SPEECH

the premature gloom of darkness and of death,—the ever-to-be-lamented Henry W. Grady of Georgia? Have you forgotten the eloquence and the pathos with which he pleaded the cause of his people to the men of New England? Have you forgotten how he told them of their domain, where was centered all that could please or prosper mankind, blighted by the presence of an alien and inassimilable race? Have you forgotten how he told them that nothing but this race problem closed to the world the fairest half of the republic, hardened the hearts of brothers for thirty years estranged, and stood between them and such love as had bound Georgia and Massachusetts at Valley Forge and Yorktown? Have you forgotten how he told them that the resolute, clear-headed, broad-minded men of the South, men who had plucked courage from despair amid the ashes of their war-wasted homes, wore this problem in their hearts and their brains by day and by night, and shuddered as they gazed into its awful depth with its lurid abysses and its crimson stains? No, you cannot have forgotten the strains of that eloquence, the sublimest and most touching heard by mortal ears since the days when the voice of Patrick Henry awoke to resistance against tyranny the slumbering energies of Virginia. And will you now intensify the darkness of this melancholy picture? Will you add to the distraction and sorrow of that land which you once loved to call mother? You may. But did I stand where

AT SANTA CRUZ

you stand, I would rather have my arm fall palsied by my side than have her turn her reproachful eyes on me and exclaim, "Thou, too, my son!"

The final price that we must pay is the price of blood.

We must walk in the footsteps of England. We must follow the example set by her in the Transvaal. Like her, we must enforce commercialism at the point of the bayonet. Like her, we must, upon a frivolous pretext, invade a country whose people have never wronged us, and over their ruined homes and fields, crimsoned with the blood of their sons and ours, hoist the flag of trade. We have already shown ourselves zealous imitators of her policy. Already have we tasted of its bitter fruit. Up to the present time, we have sent to the Philippines over eighty-one thousand soldiers. Of these nearly six thousand have been killed, and over four thousand are now in hospitals. That the conflict is not abated is proved by continued reports of battles. And that the hour of withdrawing, or even diminishing the number, of our troops has not arrived is evidenced by the declaration lately made that it was not wise to weaken ourselves there by sending soldiers to China. Our blood and the blood of a people guilty of no other crime than that of aspiring to independence must continue to be shed in order that the Moloch of trade may be appeased. And yet we talk of our humanity, and boast of our civilization!

SPEECH

This, then, is the price that we must pay for the retention of these islands: The loss of national honor; the violation of our Constitution; the burden and the dangers of a standing army; the introduction of an alien and inassimilable race; the blood of our people.

What is offered in return? The cold, hard, practical aspect of the subject, viewed from the true Republican standpoint, has been frankly and correctly outlined by Mr. Denby, a member of the first commission sent out by President McKinley. Upon his return, he said:—

“ Will the possession of these islands—the Philippines—benefit us as a nation? If it will not, set them free to-morrow, and let their people, if they wish, cut each other’s throats or play what pranks they please. To this complexion we must come at last, that, unless it is beneficial for us to hold these islands, we should turn them loose.”

The question, then, viewed from this standpoint, is whether it will benefit us as a nation to retain these islands. The source from which national benefits are to flow is, according to all Republican authority, the expansion of trade. “ We make no hypocritical pretenses of being interested in the Philippines solely on account of others. We believe in trade expansion. We mean to stimulate the expansion of our trade, and open new markets.” Thus spoke the temporary chairman of the late Republican Convention in his address at Philadelphia.

AT SANTA CRUZ

Nobody questions, of course, that the nation at large is benefited by a legitimate and proper expansion of trade. The Republican party starts out, however, by assuming as a postulate that colonial possessions are necessary—or, at least, conducive—to such expansion. But this assumption is wholly unwarranted. The possession of colonies is not essential to expansion of trade. Such expansion is determined by entirely different causes. It depends upon quality of product, cheapness of price, and commercial efficiency. In the race for commercial supremacy between us and England, the older nation started out, more than a century ago, greatly in the lead of the newly established republic upon the Atlantic. Great Britain was at that time easily the foremost commercial nation of the globe. If colonial possessions are an essential advantage in a contest for trade, she has always possessed it. India, Australia, New Zealand, Canada, and British North America were then already hers. By additions since in Africa and Asia, her dependencies to-day throw those of all other nations combined in the shade. Her colonies, protectorates, and spheres of influence cover now nearly one third of the inhabited portion of the globe. During all this time, the United States have had no colonies. If colonial possessions, then, could insure commercial supremacy, England ought easily to have kept the lead she originally held, and in this race of a century to have distanced her rival. But such has not been the case. The nation which

SPEECH

started out without colonies, and has carried on her trade without them, has, nevertheless, outstripped her competitor. To-day England resigns the scepter of supremacy into the hands of her younger rival. To-day America sits enthroned the crowned mistress of the commerce of the world.

But were this otherwise, the question would still remain, whether trade, extended and maintained by the methods we have used, and must needs continue to use, in the Philippines, will be a benefit to the nation. Even if we should look at the subject from a merely financial standpoint, this would depend upon a comparison of cost and results. It is doubtful whether any pecuniary profit we might hope to reap from the trade of the Philippines would offset the enormous expense of maintaining it. Says President Jordan:—

“Allowing a net profit of ten per cent. on all transactions, a complete monopoly of Philippine trade would leave the people a debt of seven million dollars for every three million dollars our trading companies might gain. In time, perhaps, the outlook would be less unequal. Trade might increase, expenses grow less, but in no conceivable event would the people get their money back.”

Some benefits will undoubtedly be reaped. But by whom? There are unquestionably those who will profit by the retention of these islands as colonies of the United States, to be governed—as they are now governed—at the will of the President,

AT SANTA CRUZ

with unlimited power of appointing such governmental commissions, courts, and administrative officers as he may see fit, and of granting such franchises, concessions, and privileges as he may desire. Trusts, organized here to exploit the agricultural and mineral resources of the islands, would, doubtless, make money. Trading corporations, carrying on their operations with practically servile labor, and importing the products of that labor here free of duty, would, doubtless, make money. Shipping companies, engaged in the transportation of troops, would, doubtless, make money. The ever-increasing swarm of office-holders would, doubtless, make money.

All this may be readily admitted. But all these classes combined fall far short of constituting the nation. When they are disposed of, the question still remains, Will the possession of these islands benefit us as a nation? And I submit it to your candid judgment whether, upon a dispassionate view of the subject, that question must not be answered in the negative.

Consider first upon whom the price of the acquisition and retention of these islands will fall; consider whose the sacrifices to be made. The answer is unavoidable: Upon that great mass of humanity—the tillers of the soil, the wage-earners, the men of moderate means—who constitute the plain people.

For the protection of these the declaration was made that all men are created equal, and that the

SPEECH

consent of the governed is the only legitimate source of government. And it is upon them that the fatal consequences of the subversion of those great principles must most grievously fall.

These also are the ones who have a most abiding interest in preserving the Constitution inviolate. It was Washington's last exhortation to his countrymen that it should be sacredly maintained, unquestioningly accepted as obligatory upon all, and protected from every innovation upon its principles. It has been the one object to which the American people have ever clung with unswerving devotion. Nor is this a matter of mere sentiment. The Declaration of Independence and the Constitution are the charters by which the equality of all men is vouchsafed, the bulwarks by which they are protected against the exercise of arbitrary or despotic government. To abandon them is to give up everything that distinguishes our republic from a monarchy, everything that differentiates an American citizen from a subject of the Czar.

Upon the shoulders of the plain people must also fall the enormous burden of taxation incident to the support of the standing army needed to maintain our possession of these distant colonies. Arrange them as you may, it is upon that class that all taxes ultimately fall.

In an interview published in the *San Francisco Examiner*, on the 16th of last month, Mr. John J. Valentine, speaking of this campaign, truly said:—

AT SANTA CRUZ

"It is a campaign that has many strange features, and none is more strange than the desire of the working-people to pay the enormous cost of the war in the Philippines. The cost of that war must fall on them. It is a political truism that taxes always fall—sift down—on the working-classes. They will never benefit a nickel by the acquisition of the islands, but they must pay its cost. The Spanish and Philippine wars will have cost the American people six hundred million dollars by the end of the present fiscal year, next June. It is the nature and law of taxation to fall heaviest on the great consuming classes."

But graver consequences than those which arise from mere expenditure of money must inevitably attend the introduction of militarism as an institution in our midst. All history proves that the advent of a standing army is a menace to liberty. It is the substitute of might for right. It is the enthronement of arbitrary will in the seat of law. It is the vampire which feeds to-day upon the life-blood of the nations of Continental Europe. As has been truly and graphically said, if we adopt it, "The American child hereafter must be born with a mortgage round its neck; the American laborer hereafter must stagger through life with a soldier on his back." And the children who will be drafted to fill up the ranks of the standing army, and whose blood must be shed in battle, are the children of the plain people.

SPEECH

As it is evident, therefore, that all the burden incident to the retention of the Philippines will be cast upon the shoulders of the great mass of the people, it may now be asked, How will they profit by that retention? How will the laboring and the farming classes, which constitute the great bulk of the population, be benefited?

The climate and condition of the islands are such as to exclude from them all white persons who have to earn their livelihood by toil. Neither the journeyman nor the tiller of the soil can find a home in a country already swarming with a population denser than that of the oldest of the United States. They cannot labor under the scorching rays of a tropical sun. They cannot compete with the swarming millions of natives who work for a daily wage which would here hardly be the price of a pound of meat or a loaf of bread. They cannot remain in lands where all experience—that of Java and the Hawaiian Islands, for instance—shows that no successful enterprise can be carried on except by labor avowedly or practically servile.

But this is not all. Not only can no benefit accrue to this class, but an unavoidable disadvantage must ensue. Who shall prevent the inhabitants of these islands from coming here to compete with labor in our own midst? Will we go the length of enacting laws preventing free movement of one part of our population from one place of our territory to another? The Chinese coolie may not enter

AT SANTA CRUZ

here to-day, because of a treaty stipulation with his nation. But what of his half-brother, the Malay of the archipelago? How will you exclude him? If an inhabitant of the Philippines wishes to come here, may he not do so? Nay, more,—if having come, he desires to enjoy the rights of a citizen, who will prevent him? By the treaty of Paris, the sovereignty of Spain over these islands was extinguished. Ours took its place. If their inhabitants, having ceased to be citizens of Spain, are not citizens of the United States, of what country are they citizens? If their allegiance is not due to our Government, to what Government do they owe it? If this is not their country, where is their country?

But even if the inhabitants of these islands were not permitted to land upon our shores, the labor of the United States cannot avoid being brought into competition with theirs. The products of that labor will necessarily be imported here. This could be prevented only by a discriminating tariff, similar to that now imposed upon Porto Rico. But, in the first place, that tariff was not devised for the benefit of American labor, but of American monopolies. It was imposed at the dictation of the sugar and tobacco trusts, which, as they did not then own or control the sugar and tobacco plantations of the islands, did not wish to permit their products to enter here to compete with theirs. But by and by, when these monopolies shall have extended the sphere of their operations to these new fields—

SPEECH

when they shall own or control the sugar and tobacco plantations—what will happen? Just what has happened in the Hawaiian Islands. The tariff will be taken off, and the cheap labor of those countries will invade us in the shape of their cheaply-produced products. Will the great mass of the people—the consumers—reap a benefit from this in the shape of cheaper sugar or tobacco? Not at all. Having stifled competition and secured full control, the monopolies will continue to dictate the price, just as they do now.

Sum up, therefore, the whole question of the retention of the Philippines as colonies of the United States, and it amounts to this: Those islands are to be retained at the expense of the people for the benefit of a class. This is imperialism.

And, now, I close as I began. A momentous, a paramount question confronts us to-day. Two potent banners are flung to the breeze. Under the folds of one stands arrayed the new army of imperialism. Under the other are enlisted those who still cling to the principles of the Declaration of Independence; who still look upon the Constitution as the great bulwark of their liberties; who still revere the teachings of the sages of old, and would have their country shape its policy in accordance with the precepts of Washington and of Jefferson; who would not exchange the republic in which they and their children were born for all the monarchies and empires of Europe; who look with pride

AT SANTA CRUZ

upon the flag, and would protect it from the stain of perfidy or national dishonor.

Upon which banner shall victory perch? "The federal republic—the imperial republic, which shall it be?" Before to-morrow's sun shall have sunk beneath the waves of yonder ocean, the American people will have answered that question—and answered it forever.

LITERARY

THIS address was delivered on Thursday, December 29, 1892, before the State Teachers' Association of California, at their annual meeting, held in the city of Fresno.

It was repeated, at the request of the faculties, at the State Normal Schools in San José and Chico.

EDUCATION

MR. PRESIDENT, MEMBERS OF THE CALIFORNIA TEACHERS' ASSOCIATION, LADIES AND GENTLEMEN: Though gratified and honored by the invitation extended to me to address your Association on this occasion, yet when brought to face the task, I cannot fail to recognize the difficulties which surround it. To speak fittingly upon any subject to an assemblage composed of persons whose whole life has been devoted to intellectual pursuits were no easy task. To speak upon education—a subject to the study and comprehension of which their energies have been daily employed for years—is still more arduous. And yet, perhaps, some good may result from contemplating, from a layman's standpoint, some features of a topic with which you are all, from a professional standpoint, familiar. Light is often emitted by the attrition of minds of opposite tendencies, diversified habits, and varied pursuits. Truths are not seldom brought out and made to stand in relief by oral discussion which solitary meditation either fails to reveal, or reveals but dimly.



ADDRESS

Your Association represents a power which, measured by its influence in the State and its capacity for good, stands foremost among the great agencies of civilization. Political rulers, magistrates, legislators, all who assume the government of states or empires, deal in the main with man when his mental and moral characteristics are already fully developed or rigidly set. They may coerce, restrain, or destroy the individuals subjected to their control, but their power of altering their nature, or modifying the sources from which their conduct flows, if it exists at all, is restricted within narrow bounds. You, the teachers of the State, deal with human nature in its plastic condition. It is yours to mold it to your will. From your hands it issues, bearing largely the shape which you have impressed upon it, and which it will retain in after life. You are placed at the fountainhead of society, where the slender stream may be easily diverted into any channel which you may choose to trace. Political rulers stand below, where the broadened waters flow between fixed banks, which human power is impotent to change.

I deem it, therefore, a high privilege to be invited to counsel with you upon your mission. And if any words of mine shall result in giving you any assistance, however slight, in the discharge of your task, I shall feel that my efforts have not been wholly vain.

It is not my purpose, of course, to attempt anything even approaching a comprehensive disquisition

ON EDUCATION

upon the subject of education. My aim must simply be to give expression to a few ideas connected with the subject which, in the course of life, have occurred to me.

It is a very common error to confound education with learning. The phrase, "a well-educated man" or a "highly educated man" is not infrequently applied to one who has gone through a college or university course with success, or has achieved eminence in some special branch of learning—perhaps, especially, in classical attainments. But in the sense in which the word education is more properly used, a man may be a very learned, and at the same time a very ill-educated person. To read understandingly the ancient classics, to be versed in the nice distinctions between the various Greek dialects, to write Latin prose with Ciceronian elegance, or verse with the terseness of Horace and the elegance of Catullus, is not necessarily to be well educated. The same is true of scientific attainments. A man is not necessarily well educated because he commands the whole range of mathematics from algebra to conic sections or differential calculus, nor because he has fathomed the depths of biology, sociology, and all other allied sciences. He may know all these, and yet be very poorly educated. He may know all these, and yet be very ill-fitted for the discharge of the functions and duties of life.

What, then, it may be asked, is education? As understood by the teachers of to-day, it is, I venture

ADDRESS

to think, a proper development and training of all the faculties of man, physical, moral, and intellectual. A perfect education, were it attainable, would be the development and training of these faculties to the highest degree of which they are capable, so as to enable man to live the most ample and complete life permissible in his surroundings.

Life comes to us unsought. We are brought into the world without any act or choice of ours. From the operation of causes yet beyond our ken, we are made to form a part of the universe. The discussion of the question much agitated of late, whether the existence conferred upon us is a boon or a curse,—whether life is worth living,—seems absolutely idle. We live; and if, in the spirit of proper humility or candid philosophy, we look around us upon the various orders of created beings, we will see that the law which governs us governs them all—the law of life. The struggle everywhere is to exist, to live, and to continue, either individually or by reproduction, to perpetuate life. Man forms no exception to the operation of this universal law. He lives, and from the moment that, as a babe, he instinctively turns for sustenance to his mother's breast until his eyes close in death all his actions, whether consciously or unconsciously, are directed toward the accomplishment of two single objects,—to preserve, prolong, and broaden his own existence, and to perpetuate that existence by transmission to his offspring.

ON EDUCATION

Education, then, is the science of life. It is the learning how to live well. In fine, stated more broadly, at the risk of repetition, it is the development and training of all the faculties which enable man to attain the broadest and most complete life in himself, and transmit it to those who are to come after him.

Such an education as is here endeavored to be defined is, as the definition implies, naturally divided into physical, moral, and intellectual. It may be treated of under each subdivision, though, of course, there is no sharp line of demarcation between them, each blending to a greater or less extent with both the others.

Physical education has been named first, because, obviously, both in the order of nature and in that of importance, it occupies the first place. They deserve little sympathy and should be heard with little patience who, affecting to despise the body as a tenement of clay, fix their attention wholly upon intellectual or spiritual objects, aiming at a sort of ethereal existence, which seeks to free the spirit from the prison-house in which it is confined in utter disregard or wanton violation of the laws of physical life. To mortify the body by any species of torture,—by confinement, emaciation, flagellation, or the like,—with a view of purifying or elevating the soul, would seem about as rational as to deprive a locomotive of its due supply of water, to stave in its boiler or distort its piston-rod, with a view to make

ADDRESS

it more effectually generate steam or move over the rails. There is about as much merit in a self-imposed denial of the natural amount of food by fasting as there would be in depriving one's self of the due proportion of atmospheric air for respiration, or in ceasing to breathe altogether. True education must begin, not with degrading, but with elevating and ennobling, the body ; not with thwarting its natural functions, but with perfecting their operation.

Let those who may look upon this as a very materialistic view reflect that, as man comes into the world, the only way in which his existence is made manifest to himself and to others is by his physical being; that life itself is but the performance by the organs of the body of their proper functions; that the essential activities of individual existence are limited almost entirely to ministering to the wants of the body, and protecting it from injury or destruction; that the happiness—another word for well living—which we all strive for, is dependent upon bodily condition,—and they may perhaps modify their views and come to acknowledge a due appreciation of the importance of physical education.

Physical education is not confined to mere bodily exercise, however scientifically systematized or pursued. It has a far broader scope. The gymnasium is, after all, but an expedient rendered necessary by certain unnatural conditions which civilization imposes. In a state of nature, man needs no artificial

ON EDUCATION

training. The use and employment of his faculties in the essential activities of life, in defending himself against danger, in seeking and procuring food and shelter, in rearing and protecting offspring, give to the organs of his body the play which is natural to them, and which is conducive to their most perfect development and healthful operation. The condition of man is, then, similar to that of other animals. The eagle whose flight is among the clouds and whose pinions are daily spread in battling with the storm, the lion roaming over the desert in search of prey, the capture of which depends upon tireless activity, need no artificial exercise. Civilization, with its diversified pursuits, the drains which it makes upon bodily vigor by occupations often the reverse of natural, its overtaxing of the mental as compared with the physical energies, demands artificial means of restoration or invigoration. Without denying the value of these, it would be a narrow conception of the subject to assume that this is all that is meant by physical education.

If physical education be the acquisition of that training and knowledge which enables man to preserve physical health and vigor, so that life may be protected, enjoyed, prolonged, and perpetuated, it is obvious that it must begin with a knowledge of the body, its various organs, their functions and modes of action. In other words, it must begin with physiology. That is to say, it must begin with

ADDRESS

physiology when the learner enters upon the acquisition of that artificial education which civilization imposes; for during the period of infancy the child, if properly protected and not unwisely interfered with, will enjoy sufficient bodily activity to insure perfect health. The maxim of the ancient Greek philosopher, "Know thyself," is the foundation of physical as well as of moral or intellectual education.

That this obvious truth is always duly recognized no one familiar with the systems of education even of the present day would contend. Who has not often wondered, in looking over the course of study prescribed in schools, colleges, and universities, to note the absolute silence maintained upon this all-essential subject? Ample provision is there often found for cramming the student with all sorts of knowledge except that most essential to his own well-being. In these institutions he might be taught all that relates to the formation of the outer universe,—geography, geology, chemistry, astronomy; he might learn to load his memory with a vast mass of rubbish under the name of history, and win applause by reciting without a skip the barbaric names of the sovereigns of the English Heptarchy, or the no less uncouth ones of the French monarchs from the days of Clovis to those of Charlemagne; he might command the highest honors by writing a Greek ode or a Latin oration; and yet, after all, be graduated and leave the school to enter upon the active duties of life with the most

ON EDUCATION

meager and imperfect idea of the constitution of his own body.

Why should this be so? Why should not the study of the laws of health, so essential to happiness, so indispensable to success in all vocations of life, be included in a collegiate or university course? Why should not the student be taught what are the normal, proper, and healthy functions of the body, so that he may know how to avoid injuring them by neglect, or straining them by improper or abnormal exercise? Why should it not be demonstrated to him, until it becomes fixed in his mind as an axiomatic truth, that excess is invariably followed by exhaustion and consequent impairment? Why should he not learn the laws of dietetics, so that he may know what food to select and what to reject, which is wholesome and which injurious? A time will come—it has no doubt already, to a certain extent, come—when these studies, instead of being thrust aside as quite unworthy the attention of grave professors, will be placed in the very front of the curriculum of education.

We have only to look at ourselves to perceive how much, not only of our happiness, but of our capacity to perform the functions and discharge the duties of life, depends upon health, physical vigor, and animal spirits; to know that depression of mind, melancholy, and discouragement are the attendants of a low degree of vitality; that the intellect itself is the slave of the body; and that

ADDRESS

fancy soars upon golden pinions or droops with leaden wings, according to physical condition.

It is not proposed, nor would time permit, to follow the development of this subject to its legitimate conclusions. Before dismissing it, however, one closing remark may perhaps be made. No greater crime against education can be imagined than that which is committed by those who, having the training of the young committed to their care, allow the cultivation of the mind to be pursued at the expense of the body. Long experience has demonstrated that a certain number of hours of the day can be profitably devoted to study. The effort to go beyond the prescribed limit is productive of disastrous results: weariness, exhaustion, and consequent impairment of both body and mind. If teachers, proud to see their classes make a good showing, and, therefore, prone to stimulate them to high exertions, could realize the incalculable mischief their childish vanity begets, when they not only permit but encourage a bright pupil to study beyond the prescribed time and forego the hours of healthy exercise and recreation, in order to prepare himself for a brilliant examination, or to win some coveted prize and reflect credit upon the institution, they would soon desist from their unpardonable violation of the laws of sound education. If they would only reflect, they would see that domestic animals are treated with more sense and more consideration. Far better that the pupil should be

ON EDUCATION

looked upon as a dull scholar, and lag at the foot of his class, than that he should break down his health in an unnatural effort to accomplish intellectual feats beyond his normal strength. In the race of life, in the contest for that which the world looks upon as success, and for the attainment of which the advantages of education are most commonly sought,—the possession of wealth, or the enjoyment of position, office, or rank,—the dull scholar, leaving school with health and animal energy unimpaired, is very apt to have more than an even chance of distancing the one whose constitution has been undermined by overstudy; whilst in the enjoyment of life—health, peace, happiness—he will be sure to outstrip him. That which is true of the individual is also true of the mass or aggregation of individuals composing the community or State. The strongest and most vigorous race will always be the dominant race, not only in war, but in commerce and other pursuits.

The second division of our subject concerns the moral side of our being. While physical education begins and ends with the individual, moral education, the next in the order of nature as well as of importance, deals with him not as an isolated entity, but as a member of a group or species. The aim and scope of this education are to inculcate upon the individual the proper principles and rules of conduct to be adopted by him toward others, in relation to the family, to society, and to the State.

ADDRESS

Recognizing that I am speaking to the teachers of secular and not religious schools, I do not include in this definition man's relation to the Deity. Addressing a body created and supported by the State, it is proper that my remarks should be restricted to a view of education from the standpoint of the State, and not from that of any creed or dogma; from the standpoint of reason alone, and not reason guided by faith.

It has been objected in some quarters that moral education is unattainable without religion, and that schools where religious teaching does not constitute a part of the course are pernicious and baneful. These objections assume that there is a conflict between the moral education which reason indicates, and that which religion inculcates. But why this assumption? To reconcile religion with science, to show that the accents of revelation are in unison with the voice of reason, has occupied the labors of not a few of the brightest intellects which the world has produced. These enlightened men have failed to see any menace to faith in the teachings of science. Why should such a menace be assumed to exist upon the subject of morality? It would be strange indeed if, upon a broad and comprehensive view of the subject, it were not found that the moral education which pure reason leads us to adopt is the same as that which pure religion inculcates,—in other words, that the conclusion reached by one is the same as that arrived at by the other.

ON EDUCATION

It should be noted, however, that the word "religion" is used in this connection to express an idea wholly distinct from theology. If we accept religion as the work of God, theology must still forever remain the work of man. Stripped of all its non-essential or conventional adjuncts, of all the refinements which casuistry has weaved around it, is religion aught more than morality divinely taught, —a code of ethics believed and accepted by man as promulgated and sanctioned by the Deity? When the historian describes the Jewish lawgiver descending from Sinai, bearing in his hands the tables of the Commandments, and shows us the tribes of Israel accepting these as the rules traced by the finger of Jehovah for their guidance, he describes the laying of the foundation of the Jewish religion. And yet what were those Commandments but a compendious code of moral conduct? When the same historian records or collects the teachings of Christ, what else does he present to our mind but rules of conduct, laws governing man in his relation to his fellow men, precepts for guidance in his actions as a member of the family, of society, of the State? To proclaim these rules, and to teach man the way to observe them, was, from the standpoint of history, the beginning and the end of the mission of Christ upon earth. Theology came afterward. Councils and synods, with their disputations upon points of doctrine, followed later. Schisms, sects, and bloody wars, born of the spirit of controversy, were subse-

ADDRESS

quently ushered in by time. The imagination of man wove a subtle fabric around the simple words of the Master. But religion—religion essentially considered—is to-day as it was when Christ pronounced the Sermon on the Mount or Paul preached to the Athenians, conduct conformable to the rules accepted as God-given.

The consonance of reason with religion upon this subject may be stated in one word. There is not contained in the books of religion one single essential precept or rule of conduct, one single essential commandment to do or to refrain from doing, which is not conformable to pure reason, unaided by revelation.

Moral education, as already stated, has for its object the regulation of conduct toward others. In what ideas and what necessities it is founded may perhaps be expressed by an illustration. Were a man living alone upon an island, it would be difficult to consider him subject to any moral laws. His round of actions would all center in himself. His whole time would be spent in ministering to his own wants, protecting himself against dangers that menaced his life or health, procuring the means of sustenance or shelter. But the moment that another, recognized as an equal, was introduced to share his solitude a certain limitation would of necessity be imposed upon him. His freedom would perforce be, to a certain extent, restricted. Another having, like himself, the right of occupation and of

ON EDUCATION

sustenance, in order to render the existence of both possible, he would unavoidably be compelled to yield something of the unbounded freedom of action which he otherwise had enjoyed. Each recognizing the other as an equal, the concessions on both sides would necessarily be equal. When in the little community thus composed each respected the equal rights of the other,—for instance, if, when one had taken possession of a particular spot for his habitation, the other forebore to trespass upon it; or if he had obtained something as the result of his individual exertions, such as a fruit of the forest, a bird of the air, or a beast of the field, the other abstained from any attempt to deprive him of it,—this elemental society would so far be governed by the laws of natural justice. And this means nothing more than that each member of the community would follow such line of action as the necessities of his situation would impose—laws springing spontaneously from his condition and surroundings, and the violation of which unaided reason would teach must necessarily lead to the disturbance, if not the destruction, of the community, and the consequent annihilation of the advantages which flow from living in a state of society. If we suppose the population of the island to be increased by the addition of new inhabitants, the elements of the problem would become more complicated, but the problem itself would remain essentially the same. With the advent of each new-comer, the freedom of the

ADDRESS

former occupants would become more and more restricted, and the adjustment of the rights of each, so as to permit to all equality of enjoyment, would become more complex and difficult. It would require greater enlightenment and keener powers of perception to adjust the balance ; but the end to be attained would remain the same—to secure to each inhabitant the greatest completeness of life attainable under existing conditions. That done, the community would be ruled by the principles of justice. The gradual and progressive training of the first inhabitant, by which he learned to perceive the necessity of the successive limitations imposed upon his freedom of action by changing circumstances and surroundings, and voluntarily to submit to such limitations, would constitute his moral education.

It may, then, be said broadly that moral education is that which fits men for the conduct they should observe toward others, so that each may live the most complete life attainable in a state of society, each enjoying, in their highest degree, all the advantages which accrue from social intercourse and co-operation, and yielding in return as little of his natural freedom or individual rights as possible. In other words, the great object of moral education, to express it in a single sentence, is to teach men to be just.

It may at first blush be said that if this be so, as the sense of justice is innate in man, this education

ON EDUCATION

must necessarily be very simple. But a little reflection will soon show that the task is not so easy. Civilization brings with it certain artificial conditions, which give rise to problems whose solution tasks the highest powers of human intelligence.

Each age presents its own complications. We live in times probably not more troublous than those that are past or those that are to come; and yet they are times when upon questions which lie at the very foundation of social existence the most divergent and antagonistic views are entertained.

Take a few illustrations: What is or should be the legal and political condition of woman in modern society? What is the condition which justice demands should be secured to her? Have we not here a problem of the gravest difficulty? The advent of Christianity found woman occupying in the most polished and enlightened community in the world a position of absolute inferiority. She was the companion of man, but hardly occupied the place of wife, as we have come to understand the term. In the Middle Ages—in those days which we are so fond of looking back to as the cradle of the common law—the wife was bound by a sacramental tie, it is true; but still her inferior position was so marked that her legal identity was absorbed in that of her husband, and she had of herself no separate legal existence in the eye of the law. And such continued to be her legal condition in one of

ADDRESS

the most enlightened nations of Europe down to a very recent period. The steps toward her emancipation have, in the present century, been very great, no doubt; but as an evidence of the tardiness with which they have been taken, we have but to look at the statute-book of our own State. Even here, upon this Western coast, the fetters have been struck off slowly and one by one. Gradually the laws which prohibited a woman from conveying her property without the consent of her husband, from making any contract for the payment of money, have been repealed; and yet it was not until the recent session of the Legislature that the last relic of barbarism, which prevented a married woman from being appointed executrix or administratrix, or from acting as the guardian of her own child, was wiped out. And what is the position which woman is to occupy legally and politically in the future? This is a grave question. Nor let it be said that it belongs to the sphere of politics alone. It is a question of morals—a question of justice.

Again, property has, by universal consent, been considered hitherto as one of the rights which lie at the very base of society. That a man owns what he has acquired, that he may do with it what he pleases, have been accepted almost as axiomatic truths since the existence of organized government. And yet it would betray a purposed ignorance of what is going on around us to deny that there is a spirit abroad which threatens this very foundation

ON EDUCATION

of the social fabric. From the day when a French socialistic writer proclaimed that property was theft to that in which Henry George issued his last pamphlet, denying the right of individual ownership of land, there has been a gradually growing agitation upon the subject of property rights. Nor is this agitation to be put down by the pooh-poohing of those whom it most nearly affects. The titled nobleman, sitting in the ancestral hall which has come down to him entailed since the days of William the First, or the new-made millionaire, reposing in the palatial mansion built but yesterday with the proceeds of speculation or stock-jobbing, may smile in fancied security and deride the mutterings of the threatened storm; but as long as poverty begets hunger, and hunger unchains the demons which lurk in human breasts, it will behoove those who have to acquire a just appreciation of the rights of those who have not. Nor, again, let it be said that this is purely a political question. It is a question of morals—a question of justice.

These are but illustrations of the problems which surround us in the moral world. Many more are at hand, and, did time permit, could be adduced. Why should the education of the youth of the country leave them uninstructed upon these and similar subjects? These are questions with which, in the course of life, in their capacity of citizens, as voters, legislators, or magistrates, they will in some form have to deal.

ADDRESS

Time admonishes me to hasten to say a few words upon the third and last division of the subject before I close.

Intellectual education is enumerated last, because it is in reality subordinate and subsidiary to both physical and moral education. The object of all study is knowledge, and the value of the study is in the direct ratio of the usefulness of the knowledge acquired. Obviously, that knowledge alone is useful which enables or aids us properly to regulate our actions, either as individuals or as members of society.

While it is impossible to indicate the studies which are to be adopted, I may perhaps be permitted to make a few observations upon the limitations with which certain studies should be pursued.

Take, as an illustration, the study of grammar. I have looked at times into treatises on grammar placed in the hands of very young boys and girls, and confess that I have been amazed. The grammar of to-day, even that which is intended for children of immature minds, is too often a book in which the author seems to be intent rather upon the display of his own metaphysical subtlety and hair-splitting ingenuity than the imparting of useful knowledge. Instead of simplifying, the purpose seems to be to make the subject complex and difficult. I can imagine few severer tasks that could be set to a man of mature years in active life—lawyer, physician, or merchant—than to be com-

ON EDUCATION

elled to master and stand a creditable examination upon some grammars that I have seen put into the hands of young lads at school. The waste of time entailed by the immature attempt to master these absurd books is enormous and irretrievable.

The truth would seem to be that it is contrary to all rules of orderly education to put a grammar into a child's hands, especially an English-speaking child. The English is probably the simplest of the grammars of the languages of Europe, ancient or modern. Compared with those of the Greek, German, or French, it is simplicity itself. The child, if kept away from contact with rude or vulgar associates, will, without effort, learn to speak and write with substantially grammatical accuracy. When this is attained, when the student has reached the point where he can speak and write with both correctness and ease, he can then learn the few essential rules—and they are very few—of English grammar. He will thus be taught in a few weeks what the immature mind of the child is coerced into vain efforts to acquire through years of wearisome and repulsive labor.

Another subject upon which I might, with your indulgence, wish to say a word, is that of the study of the classics. During the period of the revival of learning which followed after the long night of the Middle Ages, it was natural, if not unavoidable, that the energies of men intent upon the acquisition of knowledge, or inclined to cultivate the graces of

ADDRESS

belles-lettres, should be devoted to the study of the treasures which had survived the wreck of Greece and of Rome. The works of the master spirits of antiquity had come down through the centuries as the most faultless productions of periods in which the human mind had attained to a degree of perfection in art, literature, and science, with which nothing since then created had been fit to bear comparison. The consummate beauties of the tongue in which Homer sung to the princes of Attica, or of that in which Cicero addressed the multitude in the Forum, were revealed to the student of the court of the Medicis or of Francis the First, when, with perhaps one single exception, the languages of modern Europe were still in a state of formation. Classic literature had already long since covered the broad fields of history, eloquence, and poetry, when, by the light of the dawn of the revival of learning, little more could be found in these departments than the dry chronicles of monasteries, the songs of troubadours, or the pedantic disputationes of schoolmen. The growing appetite for learning had to seek gratification in the productions of antiquity or go unappeased.

It was of course, therefore, that in the academies, the colleges, the universities, which the enthusiasm of the period founded and endowed, the study of Latin and of Greek should constitute the main, if not the entire, pursuit of both the teacher and the taught; that excellence should be

ON EDUCATION

measured by reference to these old standards; and that to imitate the masterpieces of the ancients should be the ambition of every learned man. Honors and rewards waited upon those who had attained such excellence. Princes and potentates vied with each other in drawing to their courts and numbering among their retainers the renowned scholars of the day. It comported with the conservative spirit of the times, too, that institutions of learning founded upon these principles and aiming at the accomplishment of these objects, should for a long period have followed in the path which was originally traced for them, and that for generations thereafter scholarship should have been the synonym of proficiency in the ancient languages, and a liberal education—the education of a gentleman—should have represented the capacity to understand the excellences and imitate the beauties of their great masters.

It would have been strange, however, if in the course of time a reaction had not taken place. With the march of civilization, the discoveries of science, the development of the human mind, the nations of Europe came, each in turn, to have a language as fixed, as copious, as capable of expressing the most powerful or most subtle thoughts of the mind or emotions of the heart as the tongue of Plato or of Sophocles, of Cicero or of Horace. In turn, each people came to have its own literature, the natural outgrowth of the genius which

ADDRESS

sprung from its own race characteristics and surroundings. Time gave birth to poets, historians, orators who might well claim a place alongside of even the most illustrious names of antiquity. Whatever predilection might have been transmitted from generation to generation for the great things accomplished in the past, it would have been a matter of wonder if the student had not at times paused to institute comparisons between the productions of his living mother tongue and those of languages which had been dead for centuries. The youth who, reading the speeches of Burke or Webster, had become imbued with the grandeur of the philosophical statesmanship of the one, or the broad, lofty, and magnanimous patriotism of the other,—who as a schoolboy had recited with glowing cheek and beating heart the stately peroration of the British orator upon the impeachment of Hastings, or the still grander and sublimer one of the American in his reply to Hayne,—could not but pause to ask if in anything that Greek or Roman had ever uttered a loftier height of thought or expression had been reached. He who had seen unfolded upon the stage the creations of the genius of Shakespeare could not but ask whether even the Athenian dramatists—whether Sophocles or Æschylus—had ever depicted the emotions or passions of men in truer or more striking colors.

That the reaction should have taken place, and should now continue to take place, was inevitable.

ON EDUCATION

However much the spirit of conservatism may contend to the contrary, it is obvious to any one at all familiar with the march of the human intellect that classical studies do not hold to-day in the scheme of education the place which they did one hundred or fifty, or even twenty-five, years ago. They are not wholly abandoned, it is true, nor is it desirable that they should be; but they are no longer permitted to constitute the whole or even the most essential part of the curriculum.

It may be asked if it is intended to deny the value of the study of the classics as a mental discipline. By no means. The discipline acquired by such study is, if not the best, still, beyond dispute, excellent. The intelligent mastery of the ancient languages will still lead undoubtedly, to the formation of correct taste in literature, and aid in the attainment of perfection in style, even in the vernacular. Such study has its just value, no doubt, and in certain branches of education will still long continue to be pursued. The objection is to making it the staple of collegiate education under all circumstances. The question is, Can it be pronounced to be the best for all men who seek to obtain an education? If the student is to become a soldier, and is destined to devote his life to the science of war, it must be evident that his ability to read Pindar's odes or Virgil's bucolics in the original is for him an attainment of little value, and that the length of time spent in reaching that attainment has

ADDRESS

been, if not wasted, at least not most profitably applied. If he is to spend his life in a counting-house, and his success depends upon his acquaintance with the intricacies of modern commerce, it will benefit him little to know in detail the political condition of the Grecian states during the war of the Peloponnesus, even if he should acquire that knowledge from the luminous pages of Thucydides. The point is not to abolish the study of the classics altogether; it is to restrict it to those who may by that study best fit themselves for the activities of that life which they are destined to live—among whom might be classed the theologian, the lawyer, the orator, the historian, and all who make of literature a pursuit.

This leads to the consideration of the chief truth, which may deserve a more attentive consideration. Every study must be calculated to impart discipline or knowledge. A study properly selected should impart both; and that study is, in each individual instance, the best and most eligible which simultaneously imparts both in the greatest possible degree. If the student is destined for the law, a thorough course of mathematics will, no doubt, give his mind some useful discipline; whilst it must be admitted that the amount of knowledge imparted, viewed from the standpoint of usefulness in his profession, is comparatively trifling. If, on the other hand, his purpose is to become a civil engineer, the study of the pandects of Justinian, the treatises

ON EDUCATION

of Puffendorf, or the commentaries of Blackstone, while affording, no doubt, healthy mental exercise, would hardly assist him in building the loop over the Tehachapi or running a tunnel on the Comstock. Were it not the better scheme of education that the engineer should leave law-books to the man of law, and the lawyer should abandon the mysteries of Napier's logarithms or Newton's Principia to the man of science? Would not both thereby reap the advantages of an education which affords discipline and information at the same time?

The brief duration of human life forbids even an attempt at the acquisition of universal knowledge. The still briefer time which may properly be devoted to education, covering in all seldom more than a third the average length of life, makes it folly to attempt all the studies which it might be, in some degree, useful or agreeable to pursue. If the period of education be one of preparation for subsequent activities, it would seem as if the best possible use that can be made of it is to devote it to that preparation which will best enable the student to discharge the duties of his own individual life. To attain success or eminence in any business or pursuit demands nowadays special aptitude and undivided devotion. The days of universal geniuses, if they ever existed, are past. The men of to-day are compelled to confine themselves not only to particular professions or occupations, but each pro-

ADDRESS

fession is itself, in turn, subdivided into branches. The age is essentially one of specialists.

The lesson to be derived from these undoubted truths would seem to be, that intellectual education should, from as early a period as possible, be directed to the attainment of that special knowledge and discipline which is best adapted to the business or pursuit which the student is destined to follow. As soon as those branches are mastered which are common to all education,—reading, writing, and the rudiments of arithmetic,—the whole subsequent intellectual training should be governed by keeping steadily in view the end to be attained. Why should not a youth destined to be a lawyer be trained, as soon as his vocation is ascertained, in those studies which are specially connected with the legal profession? Why should not the same be true of the physician, the soldier, the merchant, or the man of science? Each of these, by pursuing the studies which are peculiar to the other, may undoubtedly gain some mental discipline, but by devoting himself to the studies which are peculiar to his own selected pursuit, he acquires both the knowledge and the discipline at the same time.

In conclusion, it may be asked, is there any limit to education? Is the human race susceptible of indefinite perfectibility? Is perfection itself attainable? If the object of education is to fit men for complete living, both from an individual and from a social standpoint, will there ever come a time when

ON EDUCATION

this object will be attained? These questions it would be presumptuous to undertake to answer. This much at least we know: If perfection is not within the reach of man, improvement certainly is.

You, the teachers of the State, need not despair, then, if the full proportions of the ideal which you have placed before your mind cannot be attained. The good which you can accomplish is still sufficient to gratify any rational aspirations. With faith in your mission, and courage in the discharge of your duties, persevere in your noble task. And behold, not only in the approval of the present and the anticipated gratitude of the future, but in the amelioration of the human race, the reward of your labors.

ADDRESSES ON VARIOUS OCCASIONS



STEPHEN M. WHITE

THE following eulogy was delivered in San Francisco at the banquet of the Iroquois Club, given in commemoration of Washington's Birthday, on the 26th day of February, 1901. The banquet had been postponed from the 22d on account of the death of Senator White, which occurred on the 20th of the month.

MR. PRESIDENT, AND GENTLEMEN: In the olden time, it was the pious custom of some Catholic countries to erect along the public highways shrines where the wayfarer might not only pause for rest, but might find in the contemplation of higher things solace in his fatigue and renewed courage to pursue his journey. Like these ancient places of worship, national festivals are strewn along the course of our life. At their dawn, the people lay aside for a day their accustomed pursuits to meditate upon the lessons taught by events marking epochs in their history, or to do honor to some exalted character whose example shines like a beacon-light along their pathway. The purification of soul and elevation of purpose which the devotee drew from the consecrated shrine the nation derives from these days of commemoration. Like him, it suspends

EULOGY

at intervals its onward march, pauses to survey what has already been accomplished,—the laurels reaped upon the battle-field, the securer triumphs gathered from the realms of peace,—and abandons itself to the contemplation of its true destiny and the means by which that destiny may best be achieved.

The day set apart and dedicated to the commemoration of the birth of Washington has been for now more than a century a day of praise and rejoicing throughout the land. Yet, as we observe it at this moment,—at an hour deferred,—we cannot be unmindful of the fact that the day itself was spent by the Democracy of the State in mourning and in tears. On that day the most illustrious of her champions had been stricken down in the meridian of his career, and all of him that was mortal was fast vanishing into the shadow of the dark house and the long sleep which await all the sons of men. In the presence of a death so mournful, a loss so irreparable, it would be doing violence to our own feelings not to turn a while from the special observances appropriate to this occasion, to give some expression, however inadequate, to our sorrow, and to voice, however feebly, our sense of bereavement.

It is eminently appropriate that this mournful tribute should be paid here and now; for though in a broad sense our dead leader belonged to the whole State, yet, by a nearer and more especial title, may the Democracy of California claim him as

OF STEPHEN M. WHITE

her own. By origin, instinct, and lifelong devotion he was hers,—hers by ties as close and indissoluble as those which bind the mother to her child,—hers by the reciprocal bond of affection, finding outward and visible manifestation in the great rewards, the ample honors, and the exalted offices which it had been her delight and her pride with prodigal hand to shower upon him. If Democracy means to-day what it meant in the days of its great founder,—if it still represents the equality of men; if it still stands the opponent of all class distinctions; if it still clings to the doctrine of equal rights to all and special privileges to none; if it still holds as a fundamental truth the right and the duty of the people to govern themselves,—then, well may the country be challenged to show a purer embodiment of Democracy than that which in him God had vouchsafed to our eyes.

Sprung from the people, his life, true to its origin, was devoted to one continuous service of the people. To promote their cause were all his aspirations cherished; and his dearest ambition sought no other gratification than such as it was in the people's power to bestow. In this age of gold, when wealth is in the estimation of so many the synonym of worth, he never bent the knee before the power of money. At a time when capital has by aggregation and concentration acquired such an ascendancy as not only to dwarf the individual man, but to overshadow the government of the republic itself,

EULOGY

he courted not its favor, and never sought its support. Others might bend their necks to the yoke, and seek political honors at the sacrifice of independence. His were loftier aims. From that hour in his boyhood when the first glimmer of a seat in the highest house of the nation's councils dawned upon him, he resolved that his ambition should be satisfied without the sacrifice of manhood, without the taint of corruption, without the loss of individual and absolute freedom of thought and action. The annals of our State contain no brighter page than that which records the fulfillment of that pledge. Laws may decay and constitutions may perish, but as long as a vestige of the true spirit of Democracy is left his example will remain to inspire, elevate, and purify the aspirations of the youth of the State. The future historian will write his name as that of one who, without compromise with wrong, attained the highest honors which the State could confer; one whose lofty purpose and sublime declaration—let the chronicler blazon the sentence in letters of gold—it was that he intended “to make it possible for a man to aspire to the Senatorship on his merits alone.”

Entering the Senate of the United States while still a young man, he took his place the peer in character, attainments, eloquence, and statesmanship of the oldest and most honored of those with whom in official station he stood upon an equal plane. If it be true that that once august body has degen-

OF STEPHEN M. WHITE

erated into an assemblage of representatives and servants of money,—if, to use the current phrase, it has become a mere millionaires' club,—the contamination of his surroundings never touched the Senator from California. Others might fall with servile idolatry before false idols; his faith remained uncorrupted. Others might abdicate their lofty mandate to become the tools of capital; he served but one master—the people, and the whole people. Others might degenerate into mere pawns upon the chessboard which the spirit of commercialism manipulates at will in the sordid game of money-making; he surrendered to no one his independence or his conscience. The blandishments of wealth were powerless to allure him; and the hired audacity of corruption stood awed and abashed in the presence of his integrity. Poor in purse, he possessed a treasure beyond the might of gold to buy—he owned himself.

By those who did not know him it might be imagined that a character so exalted, a fidelity to duty so unswerving were accompanied with an austerity of temperament and a repellency of manner calculated to isolate him from his fellow men. But we who knew him know that it was not so. His nature was so broad and catholic, his charity toward all so unaffected and generous, his considerateness for the feelings of others so tender and unfailing, that in the breasts of those who were brought in contact with him admiration and respect

EULOGY

ever shaded off into personal affection. His commanding ability engendered no envy. His assumption of leadership excited no jealousy. It seemed to all a pleasure to further his cause and a privilege to do him honor.

And what shall be said of those intellectual gifts now buried in the darkness of the tomb? What of that eloquence, now silenced forever, to which popular assemblies, courts, and senates, entranced by the combined spell of splendid imagery, convincing logic, and resistless conviction, have so often listened? Not this the occasion fitly to describe or estimate them. This much, however, it may be permitted to say: The imagination of the orator never hurried him beyond the limits of good taste or good sense. His powers of reasoning were never employed in furtherance of a dishonest or an unjust cause. The intensity of his convictions and the consciousness of his own rectitude never carried him to the length of impugning the sincerity or assailing the motives of an antagonist. The current of his speech flowed like a placid stream in whose waters his soul was mirrored; and if at times, under the sway of deep emotions aroused by enterprises of great weight and moment, its tide rose and swept onward like a torrent swollen by the storms of winter, it never overflowed its banks, spreading ruin and desolation in its path.

One trait of his character we recall to-day with an especial fondness. He was a Californian—in

OF STEPHEN M. WHITE

the highest and best sense of the word, intensely a Californian. Born here, he had never crossed beyond the boundaries of the State until after he had passed the thirty-second year of his life. And the California of his affection was not the State that recent agitators have schemed for,—not a California rent in twain, halved between the north and the south, shattering into fragments the broad allegiance of her sons,—but the California of to-day, and of the days of the Argonauts,—California dowered with the integrity and grandeur of her original domain, extending the majestic sweep of her imperial boundaries from Oregon to Mexico, and from the Sierra to the Pacific, gathering within her ample lap all the varied productions of her soil and clime, from the gold of the placers washed by the melting snows of Shasta to the orange and citron which perfume the fragrant groves of San Diego,—California, the land, one and indivisible, which her sons wandering in foreign climes dream of in slumbers, and, waking, long for, yearning for the hour of return.

But this is not the occasion to pronounce the eulogy of our dead friend. Our loss is too recent, our sense of bereavement too poignant to permit justice to his character, his accomplishments, and his public services to be done now. At no distant day, we shall be assured, a fitter opportunity will come. When time shall have assuaged our sorrow, and the light of our reason shall no longer be dimmed with tears,

EULOGY

as the monument which a grateful people have projected to perpetuate his memory stands unveiled, that hour will be at hand. I seem to see that monument erected in some public place of the city which has been the home of his youth and manhood, and in which his ashes repose. I see it as loving hearts would ordain it, as loving hands would mold and fashion it. Let enduring bronze transmit to generations yet unborn the lineaments of that face and the proportions of that form which it was our privilege to see in the flesh, but which in the flesh mortal eye shall see nevermore. Upon each side of its square and granite base let bas-reliefs typify the great epochs of his career. In the first, let him be represented as a boy upon his father's farm, holding the plow paused in mid-furrow while his imagination is dazzled by the visions which the veil of futurity, rent by his young ambition, displays before his eyes ; in the second, let him appear in the full maturity of his manhood and in the meridian of his intellectual power arguing before the Supreme Court of the United States the constitutionality of the Chinese Exclusion Act ; in the third, let him be seen, his face radiant and his frame dilated with the realization of his boyhood's aspirations, as he receives from the Legislature of California in joint convention assembled the announcement that he is the State's chosen Senator ; in the fourth, let him be figured at the chairman's desk, quelling with outstretched hand the stormy waves of the National Democratic Presi-

OF STEPHEN M. WHITE

dential Convention assembled at Chicago. Upon such a pedestal let there be raised a commanding statue, representing him as he stood in his place in the Senate of the United States on that fateful day of April, 1898, when, breasting misguided public clamor, and with prophetic eye foreseeing the dangers with which the lust of empire menaced our institutions, he uttered in words of inspired eloquence his protest against the declaration of war with Spain. Then, as the veil falls from the monument and the glad acclaims of the assembled multitude die upon the air, let some friend worthy to perform the task recount the life, commemorate the triumphs, and voice the praises of Stephen M. White.

ADDRESS AT ELKS' MEMORIAL SERVICE

THIS address was delivered by Mr. Delmas at the Elks' Memorial Service, held in the Grand Opera House, under the auspices of San Francisco Lodge, No. 3, on Sunday, December 2, 1900.

EXALTED RULER, LADIES AND GENTLEMEN:—
When I accepted the courteous invitation extended to me by your committee to participate in this solemnization, I was informed that the rule and custom of your order required that the subject of my address should be the immortality of the soul.

One of the most distinguished living prelates of the Catholic Church has said: “One Being alone is absolutely immortal; One alone has no beginning and no end; and that Being is God.” To conceive, therefore, the relative immortality of created man, we should first conceive the absolute immortality of the uncreated God. An exhaustive development of so vast a theme within the briefness of time imposed by the unavoidable limitations of this occasion—were it even otherwise in my power

AT ELKS' MEMORIAL SERVICE

to accomplish it—is manifestly hopeless. To attempt it would be to endeavor to discuss at a breath a subject which, whether considered in itself or in connection with its necessary relations, transcends in interest and far-reaching importance any which has ever engaged the attention of mankind. I must, therefore, throw myself upon your indulgence, if the few remarks which I am about to make shall leave your expectations unrealized or your minds unsatisfied.

In contemplating this subject, we meet at the very threshold the indisputable fact that, explore it in what epoch or in what region we may,—whether we follow it until it vanishes amid the mists of fable or examine it to-day; whether we study it among the foremost nations of the earth or pursue it among tribes upon whom civilization has never yet shed its light,—the history of the human race attests that, everywhere and at all times, with the most exalted as with the humblest of mankind, there has ever been found a hope of immortality. Toward the light which the desire of eternal life diffuses, man has ever turned his eyes with an impulse as spontaneous and irresistible as that which lifts the flower toward the beams of the sun or guides the infant to the mother's breast. The yearning to prolong life beyond material existence must needs, therefore, be considered to be an instinct—to call it by no higher name—ineradicable from our nature.

ADDRESS

Wherever human lips have moved in prayer whether in the solitude of the hermit's cell or in the multitudinous concourse which intones the swelling anthem under the groined arches of stately cathedrals, whether to voice the language of the affluent ritual of civilized man or to chant the rude incantation of the savage; and wherever human hands have erected an altar, whether of simple boughs beneath the canopy of heaven or of marble and gold and precious stones under the lofty dome of some majestic minster; and wherever human eyes, dimmed with the tears of anguish, have turned in appeal to a hidden power for assuagement in sorrow or courage in despair,—there proofs have been given of man's longing for immortality. These are the outward evidences of the religious feeling inherent in the human heart and inseparable from human existence; and without the hope of immortality were religion a delusion, worship a mockery, and prayer as vain and empty as sounding brass and tinkling cymbal.

Nor may reason discard this hope as a mere fitful and transitory gleam of our emotional nature. Strive as he may to weed from out his breast all sentiment or emotion, resolve he ever so firmly to accept as truth nothing save what the cold precepts of logic demonstrate, sear his heart as he will with the drear study of skeptical metaphysicians, still shall not man quench the fire of this inextinguishable flame. Bulwark them as he may, the time will

AT ELKS' MEMORIAL SERVICE

come when the barriers of his factitious stoicism will break asunder, and pent-up humanity will resume her sway. In the unshunnable hour of bereavement, when he shall stand amid the wreck of earthly joys lying shattered about him, the star of immortal hope alone shall remain in the firmament to guide his tottering footsteps through the universal gloom; and, with blinding tears and stifling sobs,—even as did Ingersoll over his brother's bier,—he will exclaim: “We cry aloud, and the only answer is the echo of our wailing cry. From the voiceless lips of the unreplying dead there comes no word; but in the night of death hope sees a star, and listening love can hear the rustle of a wing.”

I have read in the biography of Guizot, the great French historian, statesman, and orator, that, at the close of a life as full of honors as of good deeds, when he felt that the end was come and the hand of death was upon him, he took leave of his daughter, kneeling by his bedside, as if setting out upon a journey involving but a temporary separation, saying, “Good-by, my daughter.” “Till we meet again, father,” the child replied. And the dying man, raising himself upon his pillow, answered, “No one is more certain of our meeting than I.” And so he passed away.

What an agony of despair must death be without this hope of meeting beyond the grave! Truly has a distinguished orator of our own, speaking in the

ADDRESS

national council-hall over the ashes of a brother Senator, said, "If immortality is a splendid but delusive dream, if the incompleteness of every career, even the longest and most fortunate, be not supplemented and perfected after its termination here, then he who dreads to die should fear to live, for life is a tragedy more desolate and inexplicable than death."

I know not how better to voice my own thoughts here than by asking your forbearance to portray the impressions of an episode within my own personal experience. Rambling one Sunday morning in springtime among the mountains near my home, I came, at an abrupt turn of an unfrequented path, upon a sight which for a moment riveted my attention and arrested my footsteps. Upon the slope of a gentle declivity, beneath the wide-spreading boughs of a stately oak, a woman, clad in deep mourning, knelt, her head bowed low and her face buried in the sod of a new-made mound. The simple cross and the half-withered flowers told in mute but pathetic eloquence the story of the place. The fear of intrusion upon a spot hallowed by death and consecrated to sorrow made me pause and noiselessly retrace my steps. But the emotions which the sight had awakened accompanied me on my way. "How vain," thought I, "and impotent appear all the speculations of philosophy in the presence of such a scene as this! From the earliest dawn of human intelligence until now, sages have striven to

AT ELKS' MEMORIAL SERVICE

unroll the scroll where the secrets of existence are written, and to sound the depths of the mystery of creation. With eager feet, never tiring, each pursuing his separate path, they have climbed the steep where the star of Science shines afar, importuning the heavens above and the earth beneath to be informed of the origin of the world and told the ultimate destiny of man. Their anxious questionings have died upon the empty air, unanswered and unechoed. They have ever returned proclaiming that the oracle was dumb and the mystery unsolved. But how is it with this humble mourner? Her tremulous lips have breathed a prayer over the ashes of the dead. From the depths of her sorrowing heart she has spoken, 'I believe in God, the Maker of heaven and earth; I believe in the immortality of the soul and life everlasting.' Before the eyes of her faith the nature of the eternal and uncreated First Cause and the mystery of Creation stand revealed; and to her ears the eager doubt of the Prophet of Israel, 'If a man die shall he live again?' has been answered by the words of the Apostle of Galilee, 'As in Adam all die, even so in Christ shall all be made alive.' The God of her faith is not the metaphysical abstraction of the schools of philosophy. He is the Creator, of infinite power, whose hand hung the stars in the firmament and made man in the likeness of His own image. He is the Father, of infinite goodness and love, whose providence guides the footsteps of

ADDRESS

His children upon earth and receives them in the regions of eternal bliss after death. The soul's immortality of her belief is no vague conception of shadowy existence. It is the continuance of individual life, purified from the grossness of the flesh, perpetuating in heaven the associations, the joys, and the happiness of this world. Soothed and comforted by the consolation which this faith affords, she will rise from her communion with the dead to resume her way and calmly await the coming of the hour when both shall be united in the life to come. Deny her this belief, strip her of this faith, and her words of prayer to the Omnipotent would turn into a wail of despair. And such is and always has been the condition of sorrowing humanity. In all ages and in all climes, unnumbered souls have found in this heaven-given promise the source of strength to bear the toil, the suffering, and the injustice of this world. Skeptics have lived and died and been forgotten; systems of metaphysics have sprung up and have faded away; schools of philosophy have flourished and have decayed; but man's belief in immortality stands the beacon of eternal hope, undimmed by the mists of doubt, unshaken by the ravages of time. Now and hereafter, as of old, sorrow will still be found kneeling, like this humble mourner, by the side of the tomb, waiting to hear the accents of that voice which comes from the regions where death has never trod, saying, 'I am the Resurrection and the Life. He that

AT ELKS' MEMORIAL SERVICE

believeth in Me though he be dead, yet shall he live; and whosoever liveth and believeth in Me shall never die!"'

ADDRESS BEFORE THE SONS OF THE REVOLUTION

THE following was the response of Mr. Delmas to the toast, “The character of Washington and its influence upon the nation,” made at a banquet of the Sons of the Revolution, in San Francisco, on the 22d day of February, 1899.

MR. PRESIDENT: If a student of the firmament, whose vigils are consecrated “to trace the stars and search the heavens for power,” were asked to describe in an after-dinner speech the nature and composition of the sun, and to depict its influence upon the universe, he would stand appalled at the immensity of his task and confounded in the attempt to accomplish it. No less embarrassment do I feel when, in obedience to your courteous summons, I rise on this occasion to respond to the sentiment which you have just proposed, “The character of Washington and its influence upon the nation.”

Where, indeed, could a theme be found more vast in its proportions or more diversified in its attributes to be compressed within such narrow bounds? A century has rolled by since Wash-

BEFORE THE SONS OF THE REVOLUTION

ton was laid to rest beneath the sod of Mount Vernon. And yet wherever upon the face of the globe the emblem under which he fought the great fight of Independence is unfurled—in every city, town village, and hamlet within the confines of the republic—upon every craft flying the stars and stripes which floats upon the waters, from the stately and awe-inspiring battle-ship horrent with engines of destruction to the humblest fishing-smack that ploughs its peaceful way under the shadow of the lee-shore,—nay, in remote and strange lands, whether in the frozen regions of the pole or under the burning sun of the tropics, wherever a heart is found to beat in an American breast,—there, on this day, with public pomp or private ceremonial, the life of Washington is commemorated for now the one hundredth time since a nation, still clad in mourning for his death, decreed that the day of his birth should be so remembered and so hallowed. How, then, shall I attempt adequately to conceive or describe within this brief limit the character, the achievements, and the influence of that man whose name is thus enshrined in the hearts of his countrymen, and whose spirit holds such a spell over the minds of successive generations? How measure the worth of that life, whose fame, defying not only the power of time, but reversing the laws of terrestrial things, grows brighter with each revolving year, and keeps pace with the march of civilization wherever its standard is advanced over the inhabitable globe?

ADDRESS

But, Mr. President, if it be for these reasons impossible to trace the influence of the character of Washington upon the destinies of this country during the century that has just elapsed since his death,—a century in which the nation has gone through such varied vicissitudes,—we may, perhaps, be tempted to cast a glance upon events which immediately surround us, upon those changes in the history of our country which have been and still are taking place under our very eyes with such amazing rapidity and completeness of transformation that they appear like the phantasms of a dream or the shifting panorama of the scenic stage. What influence do the character, the example, the precepts of Washington exert to-day upon the destiny of the nation in the unprecedented and changed conditions which surround it? In the solution of the new problems which the arbitrament of a brief but decisive war thrusts upon us, what aid is sought from the recorded utterances of that tongue which was hushed in death a hundred years ago? In the heavings of the ship of state, tossed upon the waves of an unknown and strange sea, what guidance does the helmsman invoke from the chart traced by the hand of Washington before the century was born to indicate the course where national safety and national honor lay?

Mr. President, our national life during the last ten months has been crowded with events which a century ago would have filled a decade in the

BEFORE THE SONS OF THE REVOLUTION

existence of even the most advanced nation. Developments have been so rapid, episodes have pressed upon each other so closely, vicissitudes have presented features so startling and unlooked for, that the wisdom of the representatives of the people has been tasked in an almost superhuman degree to meet the varying emergencies as became the dignity and the true interests of a great nation. From that ill-starred hour, on the night of the 15th of February, 1898, when the shattered Maine sank in the waters of Havana, dragging down in the vortex and burying beneath the waves the decrepit and expiring form of one of the oldest monarchies of Europe, to the moment, which is but of yesterday, when the Senate ratified the treaty by which Spain relaxed her feeble grasp upon the last outlying fragments of the vast empire of Charles V., and we found ourselves of a sudden burthened with the guardianship of ten or twelve millions of men, strangers to our race, our language, our customs, and our civilization, whose was the name invoked in our council-halls, whose the utterances quoted, whose the example cited, whose the wisdom and statesmanship appealed to? The student of political history, turning to the pages which record the deliberations of the lawmakers of the nation, will answer, The name, the example, the precepts, the wisdom and statesmanship of Washington. When, in the beginning of the struggle, our Chief Magistrate announced to the world that the war was

ADDRESS

undertaken solely to vindicate the outraged dignity of the nation, and proclaimed that the idea of conquest and aggrandizement was to be repudiated and reprobated as a criminal aggression not to be thought of, whose was the policy thus announced? The policy inculcated by Washington in that immortal Address in which he exhorted his countrymen to maintain their attitude of isolation and independence of foreign peoples. When the news of successive victories—glorious for our arms, disastrous for our enemy's— flashed before our eyes; when we saw our foe—its armies routed, captured, or disbanded, its fleets annihilated—lying prostrate and helpless at our feet; when opportunity kindled the hunger for foreign acquisitions, and schemes of colonial domains, of protectorates, of imperial policies were at first secretly conceived, then voiced in whispers, and at length openly and boldly proclaimed, by what words did the wise and thoughtful seek to recall our wanderings, and warn us not to abandon the advantages of our singularly fortunate position, nor to entangle our peace with European ambitions or rivalries? The recorded history of the hour will answer, By the words of Washington. And now, when, in the delirious joy of our triumph, forgetful of the concerns clamoring for attention at home, we talk in swelling phrase about our duty to humanity abroad; when we imagine ourselves the champions of Providence fraught with the mission of emancipating and regen-

BEFORE THE SONS OF THE REVOLUTION

erating mankind ; when we allow our imagination to be dazzled and our vanity to be flattered by invitation to an alliance with a monarchy, kindred, it is true, but, for that, none the less proverbially egoistic in its policy, what voice rings clear through the mists of a century to warn us that "it is folly in one nation to look for disinterested favors from another ; that it is an illusion which experience must cure, which a just pride ought to discard "? What voice, I ask, but the voice of Washington ?

Are we deaf to these utterances ? Do we hear them unmoved ? Has the power which has been our guide for a hundred years now ceased to have force ? Have those precepts under which our national greatness has developed, our commerce flourished and the happiness of the people been secured, lost their efficacy ? Is the influence of the example and the teachings of Washington henceforth to be no more ? Believe it not, sir ; believe it not. The day will come—it never yet has failed to come to the people of these United States—when the temporary illusions of the hour shall be dispelled like the mists of the morning, when reason shall resume her sway, when this un-American and unrepublican talk of imperialism—this nascent proneness to neglect our affairs at home in a fantastic attempt to usurp the functions of the Omnipotent in the regulation of the world—shall be looked upon as the fitful and momentary aberrations of a fevered mind. The day will come when we shall realize that our

ADDRESS

true interests are here and concern our own people ; that the principles by which we conquered and stil maintain our independence demand that we allow other nations to achieve or retain theirs, and that, if expansion be our wish, we should remember that we have still within our own borders, upon soil indisputably ours, room enough for a ten times greater number of freemen—children of the temperate zone —than the fevered swamps of the Antilles or the jungles of the Malayan archipelago could support. The day will come when, with the accustomed reverence of old, we will return to the wisdom and statesmanship of Washington, and in the future as in the past will continue to rear the edifice of our national greatness upon the broad and safe foundations which he has laid.

In that day, and until the waters of the ocean shall have ingulfed the continent and this loved land of ours shall be no more, Author of our independence, Founder of our government, primordial Magistrate of the republic, Father and Sage, whose ashes are inurned within the sepulcher of Mount Vernon, but whose spirit can never die, be with us yet and evermore.

A POLITICAL BOSS

FROM Mr. Delmas's address to the jury in the case of J. P. Jarman vs. James W. Rea, before the Superior Court of Santa Clara County, on October 22, 1898.

GENTLEMEN, I cannot but express my astonishment at the colossal proportions which, in the eyes of his admirers, this defendant would seem to have attained. According to his counsel, he is a person of strong individuality, and wonderful magnetism as well; one destined to be not only a benefactor of his race, but also a leader among the leaders of men.

These sentiments have been voiced in your hearing, in a tone whose evident sincerity robs them of all suspicion of irony or sarcasm. Upon the amenities of personal friendship or the ties and obligations of political association which may have prompted these utterances it would ill become me on this occasion to speak. But when I see this individual held up as a model, whose example the youth of this community are exhorted to imitate; when I see him depicted as a man whom the State should be proud to honor; when I see him com-

DESCRIPTION

pared with Washington and Lincoln, and in words of audacious, if not blasphemous, irreverence with Christ himself, I should scant my rights as a citizen and do violence to my duty as an advocate were I to remain silent.

It is not—no, it is not in these exalted characters that the prototype of the political boss of to-day; be he of New York or of Chicago, come he from San Francisco or from San José, is to be sought. It is found, rather, in a personage who, after figuring for a brief space upon the public stage, died some thirty years ago bequeathing to posterity a record of infamy under the name of “Boss” Tweed.

Washington spent the years of his early as of his ripe manhood conquering upon the battle-field the independence of his country. With returning peace, he consecrated his maturer days to the task of laying broad and deep those foundations upon which has been erected the government of a people whose expanded sway, spurning now the watery limitation of either ocean, extends its imperial bounds until they embrace the Antilles in the East, while in the region of the setting sun they rest upon the islands of the Malayan archipelago. To Lincoln Providence intrusted the duty of striking off the shackles from the hands of four millions of bondmen, of extinguishing the fires of a desolating fratricidal war, of rewelding the sundered bonds of sister States, of restoring that united republic

OF A POLITICAL BOSS

of sovereigns which, standing to-day in all its pristine strength and more than its pristine grandeur, is the pattern of all present and future governments of freemen. The son of Mary—the last scion of the royal house of David, the Prince of Peace, whose coming had been announced by the seers of Israel, and foretold by prophets who in the infancy of the world had held communion with the Highest and gazed with unseared vision upon the face of the great Jehovah—even He, Messiah, came into the world to preach the gospel of peace and good will, to unite mankind in one universal brotherhood of charity and of love, to alleviate the sufferings of all who labor and are heavy laden, to raise up the bent form of sorrow, and bid its tear-dimmed eyes look up above in the consolatory hope of a life hereafter. Tweed employed his days in organizing a band of thieves, whose mission was to rob the treasury of a State, to debauch her legislators and corrupt her judges, to prostitute the manhood of her sons, and make her name a hissing and a byword among the nations of the earth.

You have heard it said here that the names of Washington, of Lincoln, and of Jesus of Nazareth are inscribed upon the Book of Life in letters whose splendor dims the luster of the evening star. The name of Tweed, written side by side with that of ruffians and malefactors, is catalogued in a turnkey's hand upon the prison register of the Ludlow Street jail.

DESCRIPTION OF A POLITICAL BOSS

Washington closed his eyes in peace under the roof-tree of his noble mansion; and in all seasons of the changing year, and from every region of the world, come pilgrims to do homage to his enshrined ashes, while his never-ceasing requiem is sounded from the deck of every craft that floats beneath the shadow of Mount Vernon. Lincoln's death was a martyrdom to duty; and as the tidings that he was no more spread through the land, the great heart of the nation ceased a while to beat, the winds seemed for a season to stand still, and the tempest's breath to be hushed, amid the wailing and lamentation of mourning humanity. Christ died upon Calvary; and when his hour had come, darkness overspread the face of nature, the rocks were rent, and the earth shook, as if the universe, expiring with its God, had blent its soul with his in its return to the source of eternal life. Tweed perished in a dungeon, amid the curses of a State which he had plundered, of a nation which he had disgraced, of mankind which he had dishonored.

Let him who walks in his footsteps take warning from his fate.

ADDRESS BEFORE THE CHIT-CHAT CLUB

ANSWER to the toast “What has law done for civilization?” at the annual dinner of the Chit-Chat Club, held in San Francisco on November 9, 1896.

MR. PRESIDENT: The sentiment to which I am called upon to respond—the effect of law upon civilization—assumes, at a glance, such vast proportions that it seems difficult to attempt to give even so much as a general outline of the thoughts which its mention evokes. To describe the gradual but ceaseless and resistless evolution of the human race from the condition of rudeness in which history and ethnology teach it was found, not so very many centuries ago; to descry the first faint glimmer of the light of arts, sciences, and philosophy upon the remote inhabitants of India; to discern its gradual expansion beyond the confines of the empire watered by the Indus and the Ganges; to trace its dawn upon the Grecian archipelago, and watch it lingering long and lovingly upon the shores of the Piræus, vivifying the arts, the literature, and the philosophy which for

ADDRESS

over twenty centuries have left their impress upon all succeeding Western civilizations ; to see it gradually tingeing with its rays the crest of the seven hills of the city of Romulus, transforming them by degrees into the abode of all that was exalted in the realm of human achievements ; to gaze upon its refraction from the imperial metropolis of the Cæsars along the Mediterranean, till on the one shore it illumined its margin from the Delta of the Nile to the Pillars of Hercules, and on the other dazzled with its splendor the barbaric inhabitants of Gaul, of Spain, and, at last, of Britain ; to behold it stationary for a thousand years, its westward course arrested, and then accompanying the daring caravels of the Genoese navigator, shining upon their path across the affronted perils of unexplored seas, and kindling at last the altar-fires of a new race of men upon a newly discovered continent ; to view it flaming across the Atlantic sky, undimmed amid the storms of New England winters or the tropical luxuriance of the Southern coast ; to notice it thence gradually diffusing its radiance over the tops of the Alleghanies, the banks of the Ohio, the waters of the Mississippi, the boundless prairies, the heights of the Rocky Mountains, the sands of the desert, the summits of the Sierra, until it tinged the waves of the Pacific ; and then—to us Californians a spectacle and a transformation full of deepest interest and most touching instruction—to contemplate the mountains, the hills, and the valleys of our own beloved State,

BEFORE THE CHIT-CHAT CLUB

changed within our memory, under the power of its benign influence, from the habitat of rude savages into the homes of a new order of beings, who, in the advancement of arts, literature, and science, in the development of the resources and the natural advantages which are the basis as well of individual happiness as of national prosperity, have in less than a half-century reached a point where they may well challenge the admiration and excite the generous emulation of the most favored of the sons of men in the most favored climes;—to do this, I say, to undertake this task, and then to attempt to measure and define the influence which law has had upon this ever-expanding light of civilization,—how it has removed the obstacles in its path, and made secure its gradual conquest over the empire of darkness,—were a task vast as the history of the human race, commensurate with the achievements of the human mind, limitless as the aspirations of the human heart.

But, Mr. President, if the general scope of the subject is too vast, perhaps one example may serve at least to illustrate it. Asked what has been the influence of law upon civilization, I might answer: Look around you. Recall and reflect upon what has taken place within the last few days under your own eyes, here where Western civilization has taken its last stand. One week ago this very night, we presented the spectacle of a nation of seventy millions of people divided into two hostile camps, each

ADDRESS

led by its own supreme commander, each composed of nearly one half the population, each filling its ranks with members eager, intent upon victory. For over three months a struggle for rule and supremacy, protracted and intense, had been waged, and the contest had then reached its highest point of fierce culmination. The principles contended for by both parties seemed in direct antagonism each to the other. From the lips of a thousand orators and in the columns of a thousand papers were daily issuing denunciations of opponents, predictions of dire calamities to follow the defeat of a favored champion, and auguries of unexampled blessings and prosperity to wait upon his success. Processions of sincere and earnest men marched in serried ranks through the streets of crowded cities, bearing aloft banners with mottoes typifying their own faith or deriding the tenets of their antagonists. Ensigns were defiantly flung to the breeze; and the emblem that floats equally over the arts of peace and the smoke of battle, the revered symbol of the nation, was borne aloft by both the contending hosts as a challenge to the world that it alone was worthy to be the protector of the nation's honor and the defender of the nation's interests.

The excitement which ever attends the confrontation of large bodies of men actuated by different aims, seeking different objects, and contending upon different lines for mastery, had reached the zenith, and seemed to threaten resort to the supreme

BEFORE THE CHIT-CHAT CLUB

though dread arbiter of human contentions—Force. The next day had been designated as the day of battle. And what happened then? The adult population of this nation, throughout the vast expanse of its imperial domain, marched to the scene of conflict. The institutions of the country and the time-honored traditions of the age had decreed that the contest should be one of mind, and not of matter,—of principles, and not of arms,—of peace, and not of war. And peacefully did it take place. Even there where the antagonism was most strenuous not an incident occurred to dim the splendor or mar the perfection of the spectacle. The sun went down; but not over a field of carnage. Its expiring beams were not reflected by the grimed visage of the victor, flushed with savage exultation; nor did they fall upon the lifeless face of a defeated foe. Instead a great people sat in calm majesty to determine the result of a victory of peace. By the light of bonfires, under the glare of electricity, through the livelong night, throngs crowded the streets of great cities, surging to and fro like the waves of a mighty ocean in their eagerness to catch the indications of triumph or defeat.

And in all this there was no commotion, no contention, no violence. Before another sun had risen the decision had been announced; each party knew the decree that fate had had in store as the culmination of its aspirations or death-knell of its hopes. And when that sun rose next morn, it looked down upon

ADDRESS

the nation's millions peacefully resuming their daily toil, industrious, contented, and cheerful,—mutual expressions of good wishes interchanged between the victorious and the defeated champions, couched in terms of most perfect courtesy and unaffected patriotism,—the banners taken from their staves, and all trace of contest swept away. One might have thought a pebble had been dropped into the smooth waters of a lake,—a splash, a ripple, and in a moment all again was still.

Therefore is it, Mr. President, that if asked what influence law has had upon civilization, I would be tempted to say: What but law—law wisely framed and wisely administered—has made so sublime a spectacle a possibility? Who but a people in whom obedience and submission to law is not so much the result of reasoning and reflection as an impulse of the heart and an instinct of the mind could exhibit such moderation in victory, such acquiescence in defeat?

ADDRESS ON INDEPENDENCE DAY

DELIVERED at Mountain View—Mr. Delmas's home in Santa Clara County—on the 4th of July, 1893.

MR. PRESIDENT, LADIES AND GENTLEMEN: At the time the Declaration of Independence was written what was California? What knowledge of it had the founders of our Government? A fragment of the vast empire which the daring genius of Spanish navigators had brought under the sway of the degenerate descendants of Charles V., it lay an unexplored region peopled by the imagination of poets and romancers with strange and fantastic beings. When Jefferson wrote and Adams proclaimed the principles of liberty and independence but five years had elapsed since the day that Junipero Serra had landed at Monterey, bearing in his hand the first spark of civilization that had cast its light upon these Western shores. Soon after, the proselyting spirit of Franciscan monks founded religious establishments in various parts of the State. From San Diego to Sonoma the country was dotted over at long intervals with churches and

ADDRESS

missions, where the savage inhabitant was gradually reclaimed from barbarism and instructed in the mysteries of a higher faith. But the influence of these institutions extended little beyond the walls or immediate confines of the mission ; and of civilization, as the term was understood by the race that had settled upon the Atlantic shore, there was none.

In the course of time, and in the first quarter of the century, Spanish rule was followed here by Mexican domination. The new masters, however, failed in turn to develop the resources which nature had lavished upon California. No progress whatever was made in agriculture. The soil was left virgin, its inexhaustible fertility untouched. Sea-ports whose safety and capacity challenge the admiration of the world lay unruffled by the prow of the merchantman. The beauty of scenery and of clime remained a sealed book to the world. And, save by the owners of a few scattered ranchos, the country was still uninhabited.

But in the middle of the century a new race of men came pouring in through the Golden Gate, streaming along the prairies, clambering over the steeps of the Rocky Mountains and the summits of the Sierra, bringing with them the ideas and the principles formulated in the Declaration of Independence and promulgated in the Constitution of the original Thirteen States. And, behold, a new era unfolding, as if under the enchanter's wand !

ON INDEPENDENCE DAY

Compare the California of to-day with the California of the day when the first venturous Argonaut came in sight of this promised land, and trace the marvelous change wrought by the influence of American civilization. As an illustration, look around you upon this our own Valley of Santa Clara. Consider what it was then and is now. Could the venerable patriarch who crossed the plains fifty years ago, and by the courtesy of whose grandchildren and great-grandchildren we are permitted to hold these exercises under the shade of these ancestral oaks, rise from his grave, his eyes would rest upon a spectacle transcending far the visions of his utmost hope. Here, where he found the Indian roaming over the valley, untouched by the beauty and unconscious of the wealth which surrounded him, he would behold the population which has superseded him, and see what industry, orderly government, the broad spirit and the high aspirations of American civilization have accomplished.

I speak to friends and neighbors, among whom there is none who does not cherish above all others the spot which prodigal nature has destined for our homes. For my own part,—if you will permit the indulgence of a personal sentiment,—I never return, even after the briefest absence, within the limits of our valley without feeling my heart expand within me. To my eyes she ever appears clad in garments of beauty. In all seasons of the year—whether

ADDRESS

when spring covers her with a mantle of verdure and decks the slopes of her hillsides with flowers, or when the rays of the summer sun embrown her mountains and tinge her wheat-fields with their own golden hue, or when autumn's prodigal hand strews the earth with the ripened fruit of her orchards, or when the reviving rains of winter come sweeping over the summit of yon Blue Ridge to refresh and fertilize the soil—she ever presents an aspect of matchless beauty. I speak in no spirit of poetical exaggeration, but with a conviction bred by years of observation, when I say that there is not on the face of the globe a spot more highly blessed with all that contributes to the prosperity and happiness of mankind than the one in which we are privileged to live. I have seen the green meadows, the manorial parks, and the baronial halls of England, have walked in the busy streets of her vast cities and heard the ceaseless din of her manufacturing centers; I have basked upon the sunny slopes of the vineyards of France, have traversed her valleys, where every rood blossoms like a garden, and have mingled with the joyous population of her glorious capital; I have wandered amid the groves of Italy, where the purple olive glistens in the sun and the fragrance of the citron and the orange perfume the air, have trodden the mosaic pavements of her galleries, and beheld those treasures of her artistic genius which challenge the admiration and despair of successive generations; I

ON INDEPENDENCE DAY

have gazed upon Switzerland's sublime panorama of lake and mountain; I have floated upon the Rhine's swift current as it flowed beneath the shadow of historical castles and mediæval ruins,— and, returning from all these, my eyes have filled with tears of gratitude and joy when, with the dawn of a summer morning, they rested once more upon the oaks and the wheat-fields, the orchards, the vineyards, the hills, and the mountains of Santa Clara.

We may confidently challenge England or France or Italy or Switzerland or Germany to point within their borders to a spot where the elements which make up the highest reach of civilization are combined in as ample and abundant a measure as they are here; where human liberty is subject to fewer restrictions; where the average standard of intelligence is as high, or education equally diffused; where the fruits of human labor are as fully secured to their producer; where civil government is administered with equal beneficence of results; where there is less of human suffering, misery, or poverty; where, in fine, there is an equal enjoyment of all the blessings which can confer happiness this side of the grave.

We bow our heads in grateful reverence before the spirit of those great and illustrious men who this day one hundred and seventeen years ago did by their devotion and their labors make possible the enjoyment of the gifts which we in so supreme

ADDRESS

a degree enjoy. Their memory is enshrined in our hearts. The achievements of their wisdom are inscribed upon the pages of history, and there, high above the titles of heroes and conquerors or fabled demigods, the names of the founders of this Government—of Jefferson and Franklin and Adams and Washington and Hancock and their compeers —will continue to shed their luster until the human race shall have faded from the earth and time shall be no more.

WALTER SCOTT

THIS address was delivered before the St. Andrew's Society, at their hall in San Francisco, on the occasion of the celebration of the birth of Sir Walter Scott, on the 15th day of August, 1892.

MR. CHAIRMAN, LADIES AND GENTLEMEN: In my youth it was my privilege to witness, in one of the oldest of our American universities, a ceremony the memory of which is now forcibly recalled to my mind. In conformity with a time-honored custom, the members of the graduating class came together on the last day of the academic term to bid farewell to each other and to the scenes amid which during the four preceding years they had pursued their studies. They met on the green in front of the college buildings, there, under the shade of the secular elms which had witnessed the going and coming of successive generations of students, to cast a last retrospect over the past and to prepare for the solemn moment of parting. The class historian rehearsed the events of the academic course, recalling its toils and its triumphs, its sorrows and its joys, its days of gloom and its periods of sun-

ADDRESS

shine. The student songs, with their alternating pathos and mirth, their solemn warnings or glowing sentiments of exuberant life, were sung once again. The college pipe was lit for the last time, and then broken, as a symbol of the end of youth and its lightsome pleasure, and of the beginning of manhood and its stern duties and unshunnable struggles. Then a broad circle was formed, and each bade farewell to his fellows, grasping the hands of those whom years of association and mutual pursuits had endeared, and whom, perchance, he might never meet again. And when the last cloud of smoke had floated away, the last note of melody had died upon the air, the last accents of farewell had been uttered, they proceeded in solemn procession to the library, and there, in order to commemorate their career as students and hand down to future generations a visible token of their devotion to Alma Mater, they planted—invoking the propitious favor of Providence upon the act—in an angle of one of the buttresses of the old Gothic edifice a scion of ivy. The class then separated, to meet as a class no more.

What, it may be asked, is there in common between this students' custom and the present celebration? This, perhaps: It had been the endeavor of each successive class of this ancient university, in order to add to the impressiveness of the ceremony, to procure for these occasions a plant of ivy from some place made famous in history or in song, from the crumbling stones of some renowned ruin, the walls

BEFORE THE ST. ANDREW'S SOCIETY

of some hallowed shrine, the battlements of some war-beaten fortress. And the ivy planted on this day had been brought by loving hands from Abbotsford.

And there even now, clinging and spreading over the walls of that ancient library, grows the plant whose parent vine is still green upon the banks of the Tweed, perpetuating at once the memory of the class which planted it and that of Scotland's most illustrious son. But the fame of him whose name was thus linked with this act shall outlive the work done on that day. Long after the last vestige of these students' labors shall have been effaced, after the last leaf of that ivy shall have faded, and the very walls which it embraces shall have crumbled into dust, generations of Scotchmen in all regions of the earth where the tongue of Britain is spoken shall meet as you are met to-night, to commemorate the birth of Walter Scott.

There is something as unique as it is affecting in this meeting to do honor to the illustrious dead. What writer has ever in the tide of time received the homage of affection which is being paid to-day, not only here, but wherever the adventurous feet of Scotland's sons have wandered? What poet has left so deep an impress upon the minds and hearts of his countrymen, that they have met for successive generations to rejoice in his birth and bless his memory? The Greeks held their great bards in honored reverence. But not to Homer, nor Pindar, nor Sophocles was the tribute paid which is

ADDRESS

being paid here to-night. The French have erected monuments to Corneille, to Voltaire, to Hugo. The Italians have inurned the consecrated ashes of Dante in the splendid mausoleum of Santa Croce, and the unwearied feet of pilgrims still press the tomb of Petrarch in Arqua. Statues of Goethe and Schiller adorn the public places of Germany. But when have Frenchmen or Italians or Germans ever culled out a holiday and dedicated it to the memory of these illustrious men? Great as is the name of our own Shakespeare, and exalted the fame of Milton and of Byron, universal as is the admiration of their genius, and constant the delight imparted by their creations, the day of their birth was never yet observed by their countrymen as a day of rejoicing.

What is there, then, in Walter Scott that distinguishes him from these other great masters of romance and of song, and makes his the singular felicity of these marks of reverence and affection? The answer is, I think, to be sought not only in his works, but in his life; not only in the productions of the writer and poet, but in the character of the man. Scotland is but paying back his own boundless affection. No son of hers was ever more passionately, blindly devoted to her than was he. He loved her with the unquestioning love of the child whose partial eyes see naught but beauty and perfection in the parent that gave him life. Sixty years have passed since, weary and broken with age and sorrow, he was laid upon her breast and

BEFORE THE ST. ANDREW'S SOCIETY

folded in her last embrace. But she still mourns over his loss, and, mourning, repays the great love he bore her.

The productions of Scott's genius were all, in a greater or less degree, linked with Scotland. It is no marvel; for no country, no people, no history could have afforded to a mind such as his vaster or more attractive materials, and no fancy was better fitted to illumine the theme. From earliest infancy, his soul had been filled with images of the romantic and poetic features of his country and her people, and the observations and studies of his maturer years had but deepened the impressions then received. On his nurse's knees he had listened to strange stories, traditions, legends of feudal lords and high-born ladies, of heroic devotion to fallen and dethroned princes, of rescues and hairbreadth escapes, of battles fought between lowlands and highlands, of border raids and forays, of minstrels stringing their harps in stately halls to sing the love of hapless maidens or commemorate the exploits of belted knight or mailed Crusader. In his boyhood he had deserted his books to go forth and hear with his own ears the strange tales which the shepherd and the peasant told of times gone by. He had learned the accents of their weird minstrelsy. Upon the tablets of his mind he had painted their customs and their manners. In the fullness of his manhood he had made a minute and profound study of his country's history, her antiquities, and her laws.

ADDRESS

When in later years the portals of this vast storehouse of impressions, information, knowledge, were thrown open, and the world was permitted to gaze upon the accumulated treasure, it is no wonder that it seemed as if a magician's wand had brought together such a mass and variety of rare and wondrous things. And if the marvelous richness of his genius dazzled the eyes, it is certain that its wealth was poured forth with the spontaneous and unstinting prodigality of a child. To reproduce images of Scotland in her visible forms of stream or mountain, of lake or glen, to portray the types of the beings which had peopled her in the past or present, from the highest to the lowest, from the monarch to the beggar, to exemplify the manners, customs, and peculiarities of her population, required of him no more labor than for the waters of the pebbly stream to flow and babble as they run, or for the lark to greet at morn the light of the rising sun, or for the leaves of autumn to rustle as they fall touched by the breath of the evening wind. Adversity could not quench nor sickness dim the glow of the divine fire; and whether in the gloom of his declining years, seeking in the hopeless battle against adversity to retrieve his fallen fortunes, or in the hour of sickness and pain, unable to write, but dictating to amanuenses, his genius never lost its spring, and the pinions of his fancy never drooped.

If the scenes of his creations were inspired by

BEFORE THE ST. ANDREW'S SOCIETY

Scotland and his ample page is peopled with her sons, he embodied in himself many of the most salient characteristics of the country and race which he knew so well how to depict.

The firm and tenacious character of the Scotchman inclines him to cling to established institutions and customs. I see before me now the costume which the chiefs of Caledonian clans wore centuries ago, and which modern changes in dress have not altered. The Highlander still marches into battle to the shrill note of the bagpipe, which the clarion of modern armies has been unable to replace. This national tenacity of the past is one of Scott's most striking characteristics. Other students of history, as deep perhaps in their researches of ancient times as he, may have looked upon the Middle Ages and the institutions of feudal times with curiosity or wonder or amusement. He contemplated them with unquestioning admiration and devotion. Though living in the nineteenth century, himself the foremost Scotchman of his age, enjoying a position and a fame for which, like another illustrious poet, he might justly say he was indebted to no prince or peer alive, he still looked up to the head of the clan of Scotts with feelings akin to those with which an inferior vassal might have turned toward his lord paramount in the days of the Tudors or Plantagenets. Indeed, this veneration for the antique institutions of Scotland was not the mere indulgence of a pleasant fancy. It strongly influenced the

ADDRESS

whole course of his life. To become himself the founder of a noble house which should perpetuate his name through successive generations of accumulating and expanding titles was the chief and absorbing object of his labors. Abbotsford, with its stately halls and towers, was founded in the vain hope of realizing this dream of feudal greatness.

Another strong national characteristic of this extraordinary man was his pride of character. "Proud as a Highlander," the legend runs; and proud as a Highlander was he. "If I have a strong passion in the world," he said of himself, "it is pride." To this pride of character is largely due his lack of success at the bar. Though, doubtless, far better equipped for the labors of the profession than most of his contemporaries, yet unwilling to stoop to court the good will of solicitors upon whose favor success depended, inferiors outstripped him in the race. Pride it was which made him look down upon the brother who, by an act of pusillanimity, had brought disgrace upon his name, to refuse to recognize him, or to follow him to the grave, or to wear the customary mourning for his loss,—pride, which made him willing to meet upon the field of honor the French General who had taken offense at some strictures upon his conduct at St. Helena, though his religious convictions condemned the act, his reason demonstrated its absurdity, and his obligations to others made the possible self-sacrifice little less than criminal,—and it was

BEFORE THE ST. ANDREW'S SOCIETY

pride which inspired him to higher and nobler efforts in the days of his adversity.

To an audience of Scotchmen I need but advert to the great misfortune of Scott's later years, when, through blind confidence in business associates, he suddenly found himself in the midst of apparent prosperity bankrupt. The blow would have crushed a weaker nature. It only served to bring out the truly heroic traits of his character. With the wreck of his shattered hopes lying around him, the aims and purposes of his life forever thwarted, he might have welcomed death as a release from earthly suffering. The world witnesses instead a struggle which, in the elements of true moral grandeur, surpasses any exploit of the battle-field—the slow, unremitting, and hopeless sacrifice of life to duty. How he performed that duty—with what calmness, what cheerfulness, what devotion he labored on in a task of which others and not he were to reap the fruits, with what Titanic efforts he strove to lift the load of obloquy which pressed upon his house, let those who have read the story of his later years attest.

But human life has its limitations; human strength and endurance theirs. Before the task which he had set out to accomplish could be ended, the great magician's wand was broken, and, like the declining sun, his genius sank slowly amid ever-deepening gloom. He was in Italy when he realized that his days were numbered, and that the summons to eternity had come. True even then to

ADDRESS

his love of Scotland, he could not bear the thought of dying in a foreign land. He craved to be brought back home. Who does not recall the pathetic scene of his return? Who does not remember how, when, with the hand of death upon him, he saw the waters of the Tweed, and on coming in sight of the towers of Abbotsford his dogs came fawning around him and licking his hands, his great heart seemed to burst, and the tears fell like winter rain upon his breast!

And so, sixty years ago, he expired among the scenes he had loved so well. In Dryburgh Abbey they laid his ashes to rest. But his genius is not dead. Its beams still illumine the world. The weary mind still finds rest, and the aching heart solace and peace in the pages which his hand has traced. The objects which he cherished and pursued in life have eluded him. His dream of feudal greatness has been ruthlessly dispelled by fate. The very foundations of the noble house which he sought to create and perpetuate have been shattered by death. Abbotsford may soon pass into the hands of strangers to his name and blood. But as long as the heather grows upon Scottish hills and the Tweed flows between its banks, maidens will weep over the fate of Lucy Ashton and the simple heroism of Jeanie Deans, schoolboys will recite the parting of Douglas and Marmion and the fight between Fitz-James and Roderick Dhu, and Scotland will cherish the name and hallow the memory of Walter Scott.

ADDRESS ON THE INAUGURATION OF THE HON. HORACE DAVIS AS PRESIDENT OF THE UNIVER- SITY OF CALIFORNIA

ON the 23d of March, 1888, the Hon. Horace Davis was inaugurated at Berkeley as President of the University of California. On that occasion Mr. Delmas, who was then a Regent of the University, and acted as President of the day, delivered this address of welcome.

FELLOW REGENTS, PROFESSORS, STUDENTS, LADIES AND GENTLEMEN: On this day twenty years ago, the people of this State, represented by their Senate and Assembly in the legislative halls of the Capitol, enacted the law which gave birth to the University of California. The object of that law was to secure to the youth of the State the most complete instruction in all branches of learning, science, literature, art, industrial and professional pursuits,—in a word, the broadest and most liberal education.

Under this wise and beneficent statute, the University commenced its course; and now, after an existence of twenty years, it may with just pride claim that it has not disappointed the high hopes

ADDRESS

and generous aspirations of its founders. It is true that at first its march was slow, and perhaps uncertain; that in its way many obstacles were thrown; that it met with opposition from some who, having themselves no just conception of the higher regions of intellectual training and activity, deprecated the use of public funds for any except the ordinary common-school education; that its character was sought at times to be degraded by intimations that its management was made the vehicle of partisan schemes or political intrigues; that its security was threatened by the precarious, uncertain, fluctuating sources of its revenue; that its stability was affected by changes, unfortunately too frequent, in the incumbency of its official executive head. All this is true. But it may confidently be asserted as equally true that in time the feeble and uncertain steps of the child have become the steady and sure tread of the full-grown man; true that patience and perseverance have removed the stumbling-blocks strewn in its path; true that a wiser and more liberal spirit has developed among all classes of our people, and that, while none fail to appreciate to their full value the advantages of our admirable common-school system, few there are who would to-day deny the incalculable benefit to the State derived from the proper pursuit of the higher branches of learning which it is the special function of the University to foster; true that the just and impartial policy uniformly adopted and steadfastly followed by the

AT BERKELEY

governing body of the institution, which makes the intrinsic merit of measures and men the only criterion of adoption or selection, has removed from the reach of even the most partisan demagogue the possibility of any claim that political influences ever cross the threshold of the chamber of the Board of Regents; true that the uncertain sources of revenue have been dried up, and in their stead, under the wise provision of the statute adopted by the last Legislature, on the fourteenth day of February, 1887, a steady, perennial, and bountiful stream of supply is provided by a direct tax levied throughout the State for the support and permanent improvement of the University; and true it is also, we confidently hope, and every friend of education must hope, that the era of change and fluctuation in the Presidency has passed away, and that, with the advent of the new chief whom we welcome and honor this day, the University has at last found one who, assuming the duties of his exalted station in the meridian of manhood, will continue to fill them to the uttermost limits of life.

Neither the time nor the occasion calls for a detailed history of the course of the University, nor even an outline of its operations. The special purpose which calls us here to-day is the inauguration and installment of our new President, the honorable and honored Horace Davis. To him, in behalf of the Board of Regents, it is my pleasant duty to address words of welcome. But before doing so, it

ADDRESS

is fitting that I should express the regret with which the Board severs its connection with the learned Professor, under whose care, as President, the University has been successfully conducted for the last two years. These feelings of regret are not unmixed, however, with the consolatory thought that, though the University may lose him, the State will not be bereft of the benefit of his great scientific attainments; that his sphere of activity will be simply changed, not abolished; and that, from the summit of that mountain which the generosity of a friend of humanity has crowned with the most complete and perfect of astronomical observatories, the learned Professor, exploring the uttermost limits of space and holding communion with the stars, will continue to shed the light of his unrivaled science upon mankind and link his name forever with the fame of Mount Hamilton.

To you, sir, our incoming President, we extend our warmest welcome. We receive you with high hopes, and install you in your great office with pride. With feelings of the deepest gratification we place at the head of the University of California a man who is truly and essentially a Californian; one who, amid the absorbing cares of a full and ripe business life, has ever fostered and cherished the lessons of learning imbibed in earlier youth; one who has taught our busy population that the labors of the counting-house are not incompatible with the pursuit of letters and the arts; one whose extensive

AT BERKELEY

and daily contact with all classes has made him to know the wants of our State; one who will take pride and find ample reward in devoting to it the experience and energy of his remaining years. Once more, sir, we bid you welcome. Once more we extend to you our best and most heartfelt wishes. Once more, in behalf of the Regents of the University—and, may I not add, in behalf of the students and the people of the whole State?—we pledge you our sincere co-operation and support in the discharge of your exalted office.

ARGUMENT IN THE CASE OF COLTON vs. STANFORD, ET AL.

THE case of Ellen M. Colton v. Leland Stanford, Collis P. Huntington, and Charles Crocker was perhaps the most important cause of a purely private nature ever presented in the courts of California. The trial, which took place in Santa Rosa before the Hon. Jackson Temple, commenced in November, 1893, and lasted a year and a half. Four counsel on each side participated in the arguments, which covered a period of over four months. Mr. Delmas's closing argument for the plaintiff ended May 5, 1895. The length of the argument—it forms a printed volume of 263 pages—forbids its reproduction here. The beginning and close alone are given.

MAY IT PLEASE YOUR HONOR: It is with no little diffidence and embarrassment that I rise to address a Court which has already listened to a four months' discussion of this cause. The learned and exhaustive arguments which have been made, presenting not only in their broad and general outlines, but also in their minutest details, every phase and theory of this controversy, enforce the conviction that little now remains to say. Even were it not so, the extraordinary length of time already con-

sumed in the hearing would warn me to abstain from a much longer trespass upon the attention of the Court. It is, therefore, I repeat, not without hesitation that I invoke for a while longer the indulgence of that patience and courtesy which have presided over and lightened our labors in this place, and which will ever remain treasured up and cherished among the most pleasing and grateful memories of this protracted contest.

The magnitude of the issues involved would not permit, however, their final submission without a closing argument on behalf of the plaintiff. In that argument I shall endeavor to be as brief as the nature of the question will permit. I shall neither attempt to review nor to answer in detail what has been so well and ably said by our learned adversaries; much less shall I undertake to examine and comment upon the hundreds of adjudicated cases and precedents which they have cited in support of their theories of the law. While such a course might claim the merit of fullness, it would inevitably lead to diffuseness and detract from the order and coherence which, I conceive, should be aimed at, at least, in every discussion. I shall content myself with a statement of those propositions of law and fact which appear to me to be fundamental, and upon which I have from the beginning thought this controversy must ultimately rest—propositions in the soundness of which my confidence has in no degree been shaken by anything which has fallen

ARGUMENT

from the lips of the learned counsel on the other side.

It must long since have become apparent to the Court that the importance of this cause arises not so much from the very large amount at stake as from the prominence of the litigants and the nature of the issues involved. The names of the defendants, Stanford, Huntington, and Crocker, have been for the last twenty years familiar to every inhabitant of this coast. During that period, these men have, by their conjoint exertions, accumulated immense wealth; they have assumed absolute control of the carrying trade and commerce of the Pacific seaboard; their influence, for good or for evil, has been supreme in shaping the destinies of our State. Their power has ever been found of late greater than that of the government under which they live; and, like the great barons of the Middle Ages, or the mayors of the palace during the Merovingian dynasty, they now yield but a nominal and supercilious allegiance to the titular sovereign whom they at once rule and contemn. At the feet of these formidable adversaries, the plaintiff has presumed to throw her gage, and to challenge them to the wager of legal battle. Were the lists held elsewhere than in a court of justice the disparity between the contestants would be painfully and oppressively apparent. Against the wealth, the power, and the influence of these defendants this lady has naught to oppose, save the plain statement of the facts and the justice of

her cause. She comes before your Honor the champion of a double trust. She appears not as the protector of her own rights only, but as the defender of her dead husband, whose character has been cruelly assailed, whose grave has been ruthlessly desecrated. She is here to demand from the Court the vindication of his memory, more precious to her than any earthly treasure, and to claim the recognition of her rights to those fruits of his labors which he left as an inheritance to her and to her children.

Though the magnitude of the contest has led to exhaustive and at times confusing elaboration, yet it has ever appeared to me that the general character of the facts and the law upon which the plaintiff bases her contention is sufficiently plain and simple. In all essential particulars, the facts upon which this controversy must ultimately turn are either admitted by the defendants or established by their own witnesses. Before I enter into a discussion of those facts, however, it may be proper to state briefly and generally the position and the condition of these parties at the time of the association of David D. Colton with them, and at the time of the negotiations which led his widow to part with the interest which she had inherited from him in that association and to transfer it to them.

In the year 1861, the dream, long entertained, of uniting the Pacific Coast with the East by means of a transcontinental railway seemed at last to assume a tangible form. The times were propitious. The

ARGUMENT

public and the General Government were both disposed generously to aid in the enterprise. At that period there were found, in an inland town of this State, four men who had the sagacity to perceive the opportunity and the boldness to seize upon and turn it to their advantage. These four men combined in their union qualities and traits of character which eminently fitted them for such an enterprise. First came Huntington : cold, calculating, emotionless, self-contained ; restless in energy ; immovable in purpose ; unhesitating in the choice of means ; gifted with a capacity for business which comprehended at once the general outlines and grasped the minutest details of the most colossal undertakings ; swayed by an ambition which spurned all limits. In him the others acknowledged the untiring chief, the master spirit of the combination. Next appeared Stanford : more refined ; more popular ; more humane in his impulses ; better calculated to win public confidence and to obtain public support. Next, Crocker : bold, aggressive, belligerent ; undaunted by obstacles ; imbued with that sublime egoism and unquestioning confidence in himself which in men of finer temper is qualified by a keener appreciation of the difficulties in their path and a more modest sense of their own deficiencies. Last, Hopkins : the conservative spirit of the union ; the man of details, who brought to the administration of an enterprise in which hundreds of millions were engaged the same inherited frugality, transmitted

through New England ancestors, which in earlier days he had exhibited in husbanding the scant earnings of an ironmonger's shop in the city of Sacramento. What measure of success these men, by their combined efforts, achieved the history of the State attests. They crossed the mountains; they traversed the desert; they spanned a continent. They won wealth and power. They might have won more. They might have earned the confidence and enjoyed the gratitude of the people. Theirs, and theirs alone, the fault if the fresh recollection of their later doings has effaced the memory of the joy with which their first achievements were hailed.

The year 1874 beheld them rich and powerful. Riches and power might have brought rest. But the indomitable spirit of Huntington knew no such thing as rest. He chafed at the inactivity and luxurious indulgence of Stanford. He railed at the sentimental journeys of Crocker through Europe and the Orient. He sought upon this coast a man like unto himself—a fit companion in his policy. He found such a man in David D. Colton. For Colton united in himself many of the qualities and traits of character which were individually possessed by these other men,—the breadth of view of Huntington, the popularity of Stanford, the boldness of Crocker, the prudent husbandry of Hopkins. Negotiations set on foot finally resulted in the now somewhat famous agreement of the 5th of October, 1874. From that time, to use Hunt-

ARGUMENT

ington's own language, Colton became "one of them," "one of the firm," one of that band of railroad-men who called themselves "associates." The five formed a union which, whether it be denominated a partnership or an association, necessitated for its success mutual reliance, mutual agency, and entire unity of purpose.

This union conceived and executed plans of gigantic magnitude. It looked forward to spanning a continent with its railroads; to stretching one arm across the Atlantic Ocean to grasp at the trade of Europe, the other across the Pacific to seize upon that of China and Japan. Its means of operation were as diversified as the events which it confronted. Corporations, which absorb the individuality of ordinary men, became the mere instruments of its power, its agencies, its creatures, to be brought to light or extinguished at will. Its general business may be defined to have been the building of railroads, the taking of the bonds and stock of these roads in payment for its labor, and the creating of a market for these securities. Among the agencies which it fashioned — among these corporations which were its tools and agents — the chief was the Western Development Company, the successor in lineal descent of the now famous Contract and Finance Company.

In the spring of 1878, Hopkins died, and, in the fall of the same year, Colton was, in the prime of life, also stricken down. Upon his decease, these

defendants—the sole survivors of this union, whose policy it was to have no dormant members—devised means either to extinguish or to obtain for themselves the interests in their enterprises of the widow and sole heir of David D. Colton. Negotiations to that effect resulted in the agreement of the 27th of August, 1879, by which, in consideration of the relatively insignificant sum of two hundred thousand dollars, paid in Southern Pacific bonds, Mrs. Colton transferred to these defendants all her interests in these various corporations.

She is here to-day seeking the annulment of that contract.

• • • • •
If these facts shall be found proven, the plaintiff may, I trust, pray for the judgment of the Court, without calling to her assistance any technical rule of law born of casuistical refinement or strained presumption, whose lost origin and uncertain cause is looked for in vain through the mists of the past. She may invoke that judgment by virtue of those eternal and immutable principles which time cannot obscure nor subtlety attenuate; principles which existed as well when the Jewish Lawgiver brought down the Tables of the Law to the wandering tribes of Israel as when Roman *prætors* formulated their edicts in the imperial dominions of Augustus and Justinian, or when the great chancellors of England—the Hardwickes, the Thurlows, the Eldons—laid broad and deep the foundations of the equity

ARGUMENT

jurisprudence of Britain; principles which are part of man's being, and inseparable from his nature; principles which the finger of God himself has inscribed in the breast of every virtuous man, to enable him, in all ages, in all climes, and in all conditions, to distinguish right from wrong, to seek truth and to shun falsehood, to protect the weak from the insolence of the strong, to love justice and abhor injustice. Upon these principles, sir, the plaintiff here demands judgment in her favor. And in the full confidence that the decision of the Court, to whichever side it incline, will be guided and directed by these immutable rules of universal law, her cause is now finally submitted to your Honor.

ADDRESS BEFORE THE LEGISLATURE

DELIVERED in the Assembly Chamber at Sacramento on the 18th of February, 1901.*

LEGISLATORS OF CALIFORNIA: Permit me, before approaching the subject which brings me here, to express my appreciation of the very great honor you have done me by your invitation to address you, and to assure you that your courtesy shall be treasured among the most grateful memories of my life. Grant me leave to state, besides, in order to silence certain rumors which have reached my ears, that however inadequate my abilities may prove fitly to discharge the task I have assumed, the motives which have prompted my acceptance may at least lay some claim to your indulgence. I am the advocate of no private interest. I have been offered no reward and shall receive none save that which may be afforded by the gratification of aiding in

* Published by request of the Sempervirens Club. The measure advocated in this address was soon after passed, and, upon approval of the Governor, became a law on the 16th of March, 1901.

ADDRESS

a noble cause, and, according to my measure, discharging in some degree the debt of gratitude I owe the State I love.

I appear before you under the favoring auspices of the Sempervirens Club. That association, as you are doubtless aware, is composed of some of the foremost representatives of education, municipal government, and public affairs, and many, too, of the gentlest and most generous ladies of the land. The object which it has in view is fairly indicated by the name it has assumed. Its labors are devoted to the preservation of a fragment, at least, of those redwood forests which in the infancy of the State extended in exuberant profusion along our seaboard from the Oregon line to Monterey, but which, invaded now by the demands of commerce, are being so rapidly destroyed that unless the hand of devastation is stayed soon no vestige of them will remain. While the field of activity of these public-spirited citizens is confined to no section of our territory, yet I voice their sentiments when I state that, for the present at least, they have centered their attention upon one particular spot and the preservation of one especial body of trees. And had you visited this spot, as I lately did, had you felt, as I felt, the emotions which it awakens, had you been brought, as I was, under the influence of the spirit of the place, you too must needs share in their enthusiasm and justify their predilection.

In the heart of the Santa Cruz Range this chosen

BEFORE THE LEGISLATURE

spot is found. It presents to the eye the aspect of a vast amphitheater whose encircling walls are the dim heights of mist-crowned mountains. Seen from the crest of the ridge, it stretches toward the setting sun, its distant outlines blending the purplish-blue tints of the woods with the hazy vapors of the ocean. From this point of view you catch a confused suggestion of a great forest watered by intersecting streams. Descend from your eminence and enter within the limits of the forest. Your first feeling is one of awe. Your very breath seems hushed by the solemn stillness of the place. Here the winds are mute. Their distant murmurings are unheard within the depths of the shaded solitude. Your step falls noiseless upon the thick carpet of marl—the cast-off vesture of countless seasons—upon which you tread. The crackling of a twig under your foot or the startled cry of a frightened bird but intensifies the silence which enfolds you like a shroud. Contemplate now the scene spread on every hand in never-ending vistas. See the great moss-covered oak, the light and graceful maple, the glossy laurel, everywhere entwining their branches and blending the varied hues of their foliage in tangled profusion, while here and there the glistening trunks of clustered madroños stand out against the dark background like streaks of yellow sunlight. As you lift up your eyes, behold above the giant forms that sentinel the place. These are California's own—hers, for in no other soil have they ever found root

ADDRESS

and under no other breeze save that of the Pacific
have they ever swayed their boughs.

A sense of humility overwhelms you as you gaze upon these massy pillars of Nature's temple, whose tops, lost amid the clouds, seem to support the vault of the blue empyrean. The spell which the mystic light of some venerable cathedral may at times have thrown upon your soul is tame compared to that which binds you here. That was man's place of worship ; this is God's. In the presence of these Titanic offsprings of Nature, standing before you in the hoar austerity of centuries, how dwarfed seems your being, how fleeting your existence ! They were here when you were born ; and though you allow your thoughts to go back on the wings of imagination to your remotest ancestry, you realize that they were here when your first forefather had his being. All human work which you have seen or conceived of is recent in comparison. Time has not changed them since Columbus first erected an altar upon this continent, nor since Titus builded the walls of the Flavian amphitheater, nor since Solomon laid the foundations of the temple at Jerusalem. They were old when Moses led the children of Israel to the promised land, or when Egyptian monarchs piled up the pyramids and bade the Sphynx gaze with eyes of perpetual sadness over the desert sands of the Valley of the Nile. And if their great mother, Nature, is permitted still to protect them, here they will stand defying time when not a stone

BEFORE THE LEGISLATURE

of this Capitol is left to mark the spot on which it now stands, and its very existence may have faded into the mists of tradition.

You experience a feeling of profound sadness as you conjure up the picture of these venerable trees falling hacked and shivered, to become the commonplace materials of barter and trade. As you behold their lofty foliage stirred by the ocean breeze, you seem to hear them murmur a prayer to be saved from such desecration.

That prayer finds a response in every generous breast throughout the length and breadth of our State. It is echoed by those whose affection for California is the love of children for a mother—the Native Sons and Native Daughters—whose voice has been heard in every parlor of their noble organization. It is echoed by the officials of our great seats of learning—the Universities at Berkeley and Palo Alto, the venerable College at Santa Clara, and the State Normal School at San José. It is echoed by the Boards of Supervisors of San Francisco, Santa Clara, and Santa Cruz. It is echoed, in fine, by the people of the whole State, regardless of party, speaking both in the Republican and Democratic platforms adopted at the late conventions. In one universal accord the inhabitants of California call upon you from her mountains and her valleys, from her cities, her villages, and her farms to second the labors of those who would interpose to prevent the work of destruction.

ADDRESS

Legislators of California, guardians of her material interests, but custodians no less of her physical beauty, will you turn a deaf ear to these appeals? Upon what ground would such a course stand justified before your constituents? I have heard some men—intelligent and conscientious men, men anxious to do their duty, men interposing these obstacles in the hope, I am sure, that they may be satisfactorily swept away—I have heard a few such men, I say, formulate some objections. What are these objections?

It has been said that the present owners of this forest are wealthy men who owe their fortune to California, and who, therefore, could well afford to make a gift of this natural park to the people. The answer to this objection lies in the fact that they have no intention of doing so. You surely cannot force their bounty. Like that of mercy, the quality of generosity is not strained. What then? Because they fail to be generous will you refuse to be just? Will you decline to provide means for ministering to a public want because private individuals will not gratuitously do so? Would you, if hungry, abstain from buying food because you conceived it ought to be given you gratis? Would you, with money in your hands, allow yourselves to starve, because others forbore to treat you as objects of charity?

It has been objected, also, that the price asked by its owners exceeds the commercial value of this forest,

BEFORE THE LEGISLATURE

—that these trees, if cut down for lumber, would not yield so large a profit. But the question is not, What are these trees worth to them? but, What are they worth to us? Grant that their value to them is measured by the quantity of lumber they will yield, certain it is that we are not buying them for lumber. A forest we propose to buy—not shakes, nor boards, nor scantling. Has the forest no value beyond the number of thousand feet of lumber in its trees? In your library-hall the walls are adorned with the portraits of the chief magistrates of California, from the days of the venerable Peter H. Burnett to the present time; and from the place where I now stand I look upon the pictured forms of their early predecessors, the governors here under Spanish and Mexican sway. Admirable as works of art though these canvases be, it is readily conceived that they would bring little if offered for sale at the auctioneer's block. But would you, therefore, part with them for that? Are they worth that only to the people of this State? Are there no sentiments, memories, affections clustering around them to invest them with a value beyond their market price?

Besides, no value has yet been set upon this forest. A commission named by the Governor is to fix the price. Should the seller's demands be too high, the commission may, as provided for in the bill, proceed to acquire the property through the State's right of eminent domain.

ADDRESS

It is urged, in fine, that the burdens of taxation laid upon the people by unavoidable appropriations for governmental purposes are already heavy, and that it would not be right to increase them by expenditures in the realm of mere taste or sentiment. I readily admit that poverty must be content with the necessities of life, and should not waste its frugal store in luxuries. But we are not poor. Never has California been more prosperous. Never have her harvests been more bounteous, her commerce more diffused and lucrative, the value of her properties higher. The sum yearly expended—and well and wisely expended—for the support of our State University far exceeds the amount named in this bill. Yet higher education is, in a certain sense, a luxury. Men may live and men may thrive with the simple training of the common school.

But, with great deference, I venture to suggest to those who make this objection, whether they do not take too narrow a view of the functions of the State. In a community which has reached the degree of civilization that California has attained, do not the æsthetic sentiments—tastes, if you please—of the people constitute a matter of legislative concern as well as their material wants? Else, why this stately edifice, with its granite walls, its graceful colonnade, and its majestic dome? Why this palatial assembly-hall with its lofty ceiling, its noble gallery, and its costly furnishings? Viewed from a purely

BEFORE THE LEGISLATURE

utilitarian standpoint, your deliberations could as well be held and your legislative work performed in a plain brick structure—aye, or a wooden one—with a bare floor and pine-wood desks. Was the sum used then in erecting this Capitol ill-spent? No one would have the boldness to say so.

Furthermore, what, after all, will the money needed to save this forest amount to? Distributed per capita among the inhabitants of the State, it will not equal for each individual the value of the stationery which each one of you consumes in twenty-four hours, nor the cost of his daily carfare in coming to this chamber. The states of Europe—France and Germany notably—lay out yearly vast sums in the preservation of such remnants of forests as are left them. New York and Massachusetts do the same. The city of San Francisco has expended millions to convert the sand-dunes of her suburbs into her Golden Gate Park. The liberal yearly appropriation granted by the municipality to maintain it attests the public estimation of its usefulness. In the face of these examples shall California hesitate to spend the modest figure named in this bill to secure for all coming generations a park planted and nurtured by the never-tiring hand of Nature, compared with whose primeval grandeur man's work is but a paltry imitation?

But if you choose to look at the expenditure of the appropriation asked for in this bill as a mere financial investment, you will have little difficulty,

ADDRESS

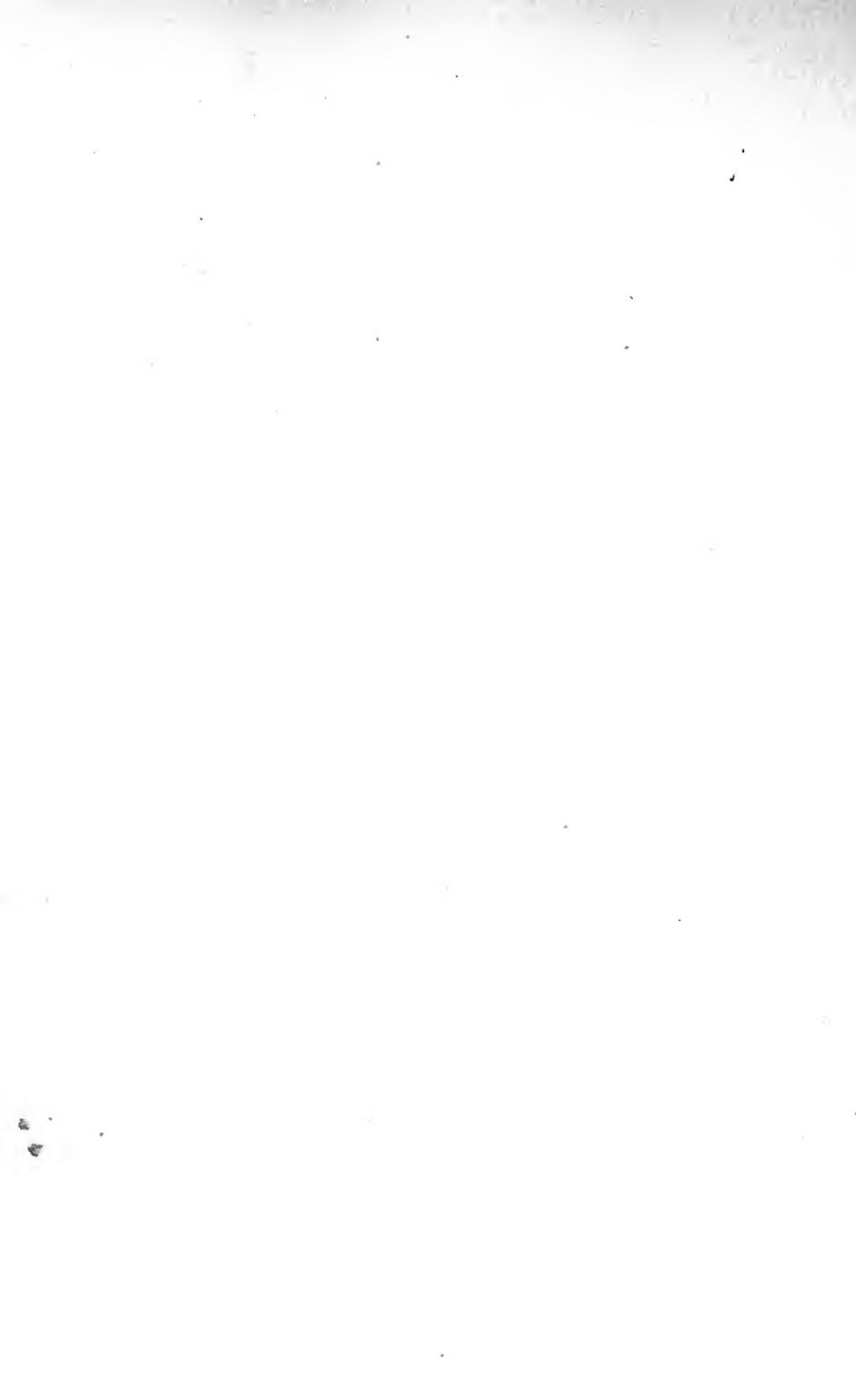
I think, in persuading yourselves that the investment will be a judicious one. The natural beauties with which our State is dowered form one of its most potent attractions, not only to the traveler who at all seasons of the year visits our shores and adds to our wealth, but also to the vast numbers of those who, having amassed fortune or competence in less-favored regions, come here to establish permanent homes.

Legislators of California, while deeply grateful for the courteous attention you have accorded me, I cannot but apologize for the trespass I have already made upon your time. No one better knows the importance of your labors here and the mass of legislation pressing upon you. Yet, even so, turn not away from this project. The people have it at heart. Attend to it—attend to it, I pray you, now. Do not leave it as unfinished business to your successors. When they shall come upon the scene it will be too late. The slopes which surround this forest are already denuded. The work of devastation has reached the very edge of these woods. There, even while I speak, the axman stands ready to strike. If he pauses, it is only to await your decision. Two years from now his work will be done, and the last remaining fragment of the primeval trees which clothe the mountains rising up at the very threshold of our metropolis will have vanished. Vain, then, will be our regrets, and all attempts to repair the evil vain. Were a conflagration to consume this edifice,

BEFORE THE LEGISLATURE

were an invading army to pull down the stately walls of our National Capitol, were a convulsion of nature to rend in twain and topple over the majestic dome which the genius of Michael Angelo has uplifted above the basilica of St. Peter, all these intelligent labor and patience might in time restore. But it is not so here. Man's work, if destroyed, man may again replace. God's work God alone can re-create. Accede, then, to the prayers of the people. Save this forest. Save it now. The present generation approves the act; generations yet unborn, in grateful appreciation of your labors, will rise up to consecrate its consummation.





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